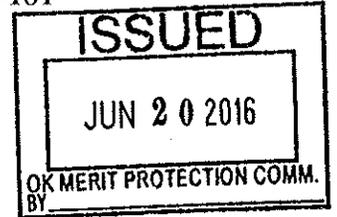


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

WAYLIE PETTIT,)
APPELLANT,)
)
V.)
)
OKLAHOMA TOURISM AND)
RECREATION DEPARTMENT,)
APPELLEE.)
)

CASE NO. MPC 13-181



FINAL ORDER

This matter came on for hearing initially on November 7, 2013 before the duly appointed, undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant objected to the attendance of a certain witness, David Lee Clark, and filed for a Writ of Prohibition and obtained an Order from the District Court of Sequoyah County staying the proceedings. The parties litigated the matter for the next seventeen months. Several status conferences were held during this interim. In May, 2015, the Sequoyah County court lifted the Writ, and the parties agreed that David Lee Clark would not testify at the hearing and that any information gained from him would not be used. The parties notified the Commission that the Writ was lifted and the parties were ready to proceed on July 23, 2015. The matter was set for hearing, however several more continuances were sought by both parties, which were granted. The procedural history is well documented with various pleadings and Orders. The administrative hearing finally resumed on April 28, 2016. Following the close of testimony, the parties were given an additional period of time following the hearing to prepare and file written summations. The Appellant, Waylie Pettit (hereinafter "Pettit"), appears personally and through counsel, Kevin Donelson. The Appellee, Oklahoma Tourism and Recreation Department (hereinafter "OTRD"), appears by and through counsel, Claudia Connor and Brett Thomas.

Appellant Pettit was a permanent, classified employee of OTRD, appealing an adverse disciplinary action of discharge. During the administrative hearing, the sworn testimony of nine witnesses was presented, along with exhibits (one additional witness' testimony was stricken from the record). Joint Exhibits 1 through 8 were admitted by agreement. In addition, the

Appellee's Exhibit 1 was admitted over the objection of the Appellant. Accordingly, the exhibits presented and admitted are incorporated herein and made a part of the record herein. This is an adverse action appeal and the burden of proof is upon the agency who must prove its case by a preponderance of the evidence.

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.

ISSUES FOR DETERMINATION

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

FINDINGS OF FACT

Background of Case

At the time of her discharge, Pettit was the Park Manager at Cherokee Landing State Park under the jurisdiction of OTRD. The parties stipulated that the Merit Protection Commission (hereinafter "MPC") has jurisdiction of this matter, that Pettit was a permanent, classified employee of OTRD, that Pettit timely filed her appeal and that Pettit was terminated effective April 30, 2013.

In January, 2013, Pettit exchanged text messages with another employee, Will Hutson, whom she supervised at the State Park. The texts included photos and jokes, with one word of profanity. These texts and messages were sent using personal devices while neither employee was on duty. Hutson sent texts and messages back to Pettit as well. A month and a half later, around February 21, Hutson complained that he was being sexually harassed by Pettit because of some of these texts and messages. This complaint came after another employee, Jimmy Mar, discussed the texts with Hutson's wife and convinced her to urge Hutson to make the complaint. OTRD began an investigation on these charges. On March 8, 2013, Pettit saw Hutson in one of

the cabins and made a comment to him about his sexual harassment complaint. This encounter lasted only a few minutes.

In early February, 2013, Pettit was sexually assaulted at the state park where she worked and lived. Around this time, she also experienced the death of a close relative. She requested and was granted FMLA. She also sought and was granted a Victim's Protective Order against David Lee Clark, the person who assaulted her. Pettit made OTRD aware of the existence of the VPO. Later, on March 22, 2013, Clark contacted one of the Park Rangers and complained that Pettit had driven a state vehicle to his residence on several occasions and supplied the names of two of his neighbors, Thomas Drew and Justin Truett, to corroborate this complaint. OTRD became aware of this information solely as a result of David Lee Clark's complaint.

In March, 2013, Jimmy Mar told the Park Ranger that he had observed Pettit in one of the park cabins with a man. He alleged that they had been in the cabin alone for several hours. Mar recited several items of "evidence" that he stated supported his claim that Pettit was entertaining a male visitor in the cabin but he couldn't recall the date this incident occurred. Mar only came forward after he learned that an investigation was on-going.

On April 5, 2013, Scott Lange, the Human Resources Director for OTRD, completed his investigation of these events (Joint Exhibit 8). On April 9, 2013, OTRD provided Pettit with notice of the proposed disciplinary action of termination (Joint Exhibit 1). The notice alleged that Pettit was guilty of "misconduct and conduct unbecoming a public employee", citing 75 O.S. Section 840-6.5(C), OAC 530:10-11-91 (a)(c)(1)(d) and OTRD policy P-135(B)(1)(3). Along with the Notice, Pettit was placed on Suspension with pay pending the outcome (Joint Exhibit 2). A pre-disciplinary hearing was held on April 17, 2013, with the finding that there was sufficient evidence to support the charges against Pettit and support termination (Joint Exhibit 3). On April 26, 2013, OTRD provided Pettit with written notice of discharge (Joint Exhibit 4). In the notice, OTRD listed the same cause for the action as "misconduct and conduct unbecoming a public employee". Pettit had no prior discipline. Pettit timely appealed her discharge.

The Testimony

The testimony of nine (9) witnesses was given in this administrative hearing, with each witness sworn and offered under oath. The first three (3) witnesses testified on November 7, 2013. A fourth witness began his testimony but was not able to be cross-examined or finish his

testimony because of the issuance of a Writ of Prohibition by the District Court of Sequoyah County. As a result, his testimony was stricken from the record. On April 28, 2016, the remaining six (6) witnesses provided testimony.

Will Hutson was employed as a Front Desk Clerk at Tenkiller State Park. He is currently a Night Auditor at the Park. He testified that as a Front Desk Clerk, he occasionally cleaned cabins and had worked with Pettit for approximately 2 years before her termination. Hutson stated that he and Pettit exchanged a lot of texts and Facebook messages. He identified the texts in Appellee's Exhibit 1 as the texts between himself and Pettit on January 6, 2013. He also identified the pictures and texts in Appellee's Exhibits 2, 3 and 4 but these were neither offered nor admitted into the record. Hutson stated that over a month later, he told the Park Ranger about the texts and photo and said he felt he had been sexually harassed. He acknowledged that he continued to text with Pettit until he filed his complaint. Hutson said that Jimmy Mar encouraged him to make the complaint because Mar didn't like Pettit and was unhappy about his PMP. He also acknowledged that his wife became aware of the texts and messages and was concerned that he might have a crush on Pettit. After filing the complaint in February, he was helping to clean a cabin on March 8, 2013, when Pettit entered the cabin and asked him if he had filed a complaint. The encounter was very brief but Hutson said he felt uncomfortable. He reported this contact the next day. Hutson admitted that he had wanted a promotion but didn't get it around the time he filed his complaint. He also stated that there was a lot of gossip at the Park and the Park Manager had told him in March that Pettit was going to be terminated. (Note: this is over a month prior to the conclusion of the investigation and the disciplinary proceeding).

Jimmy Mar was the second witness. He was a Maintenance Technician II at the Park and Pettit was his supervisor. He works out in the Park, performing various tasks and duties. Mar stated that he observed Pettit with an unknown man, exiting one of the cabins. He wasn't sure of the date when this occurred but thought it was sometime in the winter of 2012. When pressed on the timing of this incident, he indicated that he was unable to even guess how long ago it occurred. He stated that he initially saw Pettit's work truck partially hidden behind the cabin, along with another pick-up that he was not familiar with. He watched the area for approximately 3 hours while he picked up trash. He stated that after Pettit left the cabin, he entered and found feces in the toilet and a pubic hair on the rim of the toilet. He said he cleaned the cabin and left. He acknowledged that he didn't mention this to anyone until March, 2013. He acknowledged

that he “waited a long time” to say anything. Mar denies that he encouraged Hutson to file his complaint but he admits that he told Hutson’s wife to urge him to file. Mar also admits that he was upset that Pettit had recently given him a poor PMP. He said he had a difficult relationship with Pettit and felt that she treated him unfairly. He reported this incident after he learned that Pettit was being investigated for the sexual harassment.

Thomas Drew lives approximately 100 yards up the street from David Lee Clark. He stated that it is a rural area. He testified that he saw an OTRD pick-up parked at Clark’s house one or two times. He said that he doesn’t recall when this occurred, but said that it probably was in 2012. He said he worked on and off with Clark, who he referred to by his nickname of “Dink”. He said the truck he saw was a smaller, white pick-up with the state logo on the side and was, perhaps, a Chevy. He said he never saw the driver and had “no clue” who was driving. Drew also stated that he never saw the truck there in 2013. Drew testified that he couldn’t see the road or Clark’s driveway from his house and it is very wooded. Drew admitted to hearing bits and pieces about the rape charge but he never discussed it with Clark. He said he was also confident that it was not a full size pick-up.

Justin Truett’s testimony was not completed and was stricken from the record. (See Status Order, March 21, 2016).

Waylie Pettit testified that she was employed as the Park Manager at Cherokee Landing State Park. She stated that she and Will Hutson were long-time friends. She said they talked and texted often. They were both married. She said he made advances to her, and on February 20, 2013, he told her that he was “crushing” on her. She rebuffed him. Shortly after that, he filed a complaint of sexual harassment. Pettit discussed the texts and photos. She said there was nothing sexual about the photo and she sent it because the marsupial was bug-eyed and resembled someone they both knew. She said they both laughed over it. She said that Hutson never said anything to her about being uncomfortable or asked her to stop. She said he frequently sent her messages and texts as well. Pettit recounted that she was raped by Clark in the State Park on February 5, 2013. She reported it to her supervisor four days later. She also stated that her niece hung herself on February 3 and died the next day. As a result of these events, Pettit applied for FMLA on February 6, 2013. FMLA was granted due to these emotional traumas. She filed an EEOC complaint on April 9, 2013 due to the investigation and proposed disciplinary action. She stated that EEOC deferred to the Commission for

determination, however there is nothing in the record to support this. Pettit stated that sometime later she went to a cabin to talk with Charlotte Buttery, to warn her about Clark. She spoke with Buttery, who was outside the cabin she had been cleaning. Pettit then entered the cabin. She was surprised that Hutson was there and she made a brief comment to him about his complaint and then left. She said she was there for only a few moments and never intended to confront Hutson but she admits that she asked him about the complaint. Pettit stated that several Park employees drove state trucks, including Jimmy Mar. Pettit denied that she had ever driven a state vehicle to Clark's residence. She stated that she had been to Clark's house only once, with her husband and her Father to go hunting, but they were not in a state vehicle. Pettit said she was a long-time employee who had never been disciplined. She discussed her positive PMPs and said she had exceeded standards the last five or six years. Pettit said that she was on FMLA during the investigation, but she still cooperated. She said that she thought it was extremely unfair given the emotional stress she was under.

Les Pulliam is an OTRD Park Manager and supervised all of the employees at Cherokee Landing, including Hutson and Pettit. He was made aware of the texts and photos and that Hutson wanted to file a complaint. After the investigation was initiated, Hutson reported that Pettit had confronted him in a cabin and that it made him feel very uncomfortable. Pettit was then told not to contact any of the complaining employees. He stated that it was later that Mar reported seeing Pettit in a cabin with a male and that he recognized the pick-up as Clark's. Pulliam stated that there was no OTRD policy prohibiting communications between employees on personal phones or computers. Pulliam stated that there were employees who were told to stop stirring up problems regarding this investigation, specifically Violisa Russell. He said that it was his understanding that Pettit declined to pursue criminal charges against Clark.

Charlotte Buttery is a Maid II at the State Park. She testified that she and Hutson were cleaning a cabin in 2013. She said she saw Pettit on the porch of the cabin and she gave her a hug. They talked for a few minutes and then Buttery went to the van for supplies. She saw Pettit enter the cabin and then she left very shortly afterwards. Buttery said when she went back into the cabin, Hutson never mentioned what had occurred or what had been said. He did not appear upset.

Devin Harwell is employed by the Vian Public School. He said that he applied for a seasonal job at the Park in 2013. During his interview in March, 2013, he was told that Pettit no longer worked for OTRD, a full month prior to her termination.

Violisa Russell was employed at the Park in 2013 as an Office Clerk. She knew Hutson and said he never mentioned feeling any type of harassment. She also testified that she never saw Pettit do anything inappropriate. She cautioned Hutson to be careful with his complaints, and she was told by Pulliam to “stay out of it”.

Scott Lange was the final witness. He testified that he was employed at OTRD as the Human Resources Director in 2013 but was now the Human Resources Manager at the Department of Transportation. In conducting his investigation, he didn't consider the motives of the witnesses. He said that he was aware of the existence of the Protective Order, but did not know the details. He admitted that all of the texts and the photo were sent on personal time and on personal phones. Lange stated that, in his opinion, he should have conducted additional investigation. He clearly stated that Mar and Hutson's credibility was “questionable”. Lange stated that he found that Pettit did not sexually harass Hutson. He also stated that Pettit was on FMLA leave during the investigation and disciplinary process. He said that she was not required to report for work or participate in the investigation, but she did so voluntarily. Lange discussed the OTRD policies and stated that he was not aware of any policy regarding the use of a state vehicle or prohibiting incidental use while on state time. He also admitted that he was not aware of the type or model of state vehicle assigned to Pettit. Finally, Lange stated that he would have handled the investigation differently if he had been aware of all of the facts and circumstances, considering the mitigating circumstances and that Pettit was on FMLA.

DISCUSSION

OTRD alleged that Pettit engaged in misconduct and conduct unbecoming a state employee by inappropriately being in a state cabin with a man during work hours, for using a state vehicle for personal purposes, by sending inappropriate texts and photos to a subordinate and for confronting that employee about his harassment complaint. Each of these will be discussed separately.

The only evidence that Pettit inappropriately used a state cabin during work hours was the testimony of Jimmy Mar. The undersigned concurs with Mr. Lange in finding that Mar was not a credible witness. He could not recall, even generally, when he observed Pettit at the cabin. The evidence indicated that Mar was the instigator of several of the allegations against Pettit. He was disgruntled and admitted that he didn't get along with Pettit. OTRD ignored these mitigating factors and accepted his allegations without question. Further, even if Pettit was in a cabin with an unidentified male, there is no evidence except for Mar's speculation as to what was going on in that cabin, much less when it occurred and whether Pettit was actually on state time. Given the lack of specifics, the inability to provide a reasonable time frame, the vagueness of the allegations and the lack of credibility of the witness, this cause was dismissed at the close of the testimony.

The next alleged misconduct involves the use of a state vehicle for personal use. Excluding the information gleaned from Clark and Truett, the only evidence to support this allegation was the testimony of Drew. Lange testified that the identities of Truett and Drew were known only as a result of Clark's complaint. Pettit has a legitimate argument that Drew's testimony should have been stricken pursuant to the settlement agreement of the parties, as his identity and all information he provided was as a direct result of Clark's improper complaint. However, this error does not affect the outcome of this case because Drew's testimony was of no help to OTRD's position. He recalls seeing a State pick-up at Clark's residence one or two times, but could not identify the driver or the time period. Again, his testimony is overly vague. There is no actual evidence in the record, much less the preponderance of the evidence, that Pettit was the driver. There was testimony about the type and size of truck assigned to Pettit but nothing sufficient to prove that she was driving the truck in question. There is much doubt and speculation about this allegation, especially given that other employees drove state vehicles. OTRD failed to meet its burden of proof regarding this allegation.

This leaves the remaining allegations regarding the sending of text messages and photos, as well as confronting Hutson about his harassment complaint. Again, I agree with Lange's assertion that Hutson was not a very credible witness. In order to be a proper harassment claim, the conduct must be both "unwelcome" and "affect the employment status or conditions". In this case, Hutson never expressed that the texts were unwelcome, and in fact encouraged the conduct by engaging in texts and private messages himself. It is clear, as asserted by Lange, that the

conduct did not rise to the level of sexual harassment. Next, we consider whether the conduct was inappropriate and violated the employee conduct policy. OTRD policy P-135 (I.) provides that the policy governs “employee conduct and standards of behavior *while serving in an official capacity*”. None of the texts and/or photos were sent during work hours or on state time. OTRD cites (B)(1) and (3) which provide that “all employees shall be treated courteously and with respect” and that “language designed to be abusive, intimidating or offensive will not be tolerated nor will gestures or body language designed to intimidate, excite, embarrass or insult”. There is no evidence that Pettit treated Hutson discourteously or with a lack of respect. Hutson never complained until his wife and Mar got involved. It is possible that the use of the one word of profanity could be deemed as “offensive”, but again Hutson did not claim to be offended. Further, since this occurred during time off, it can hardly be asserted that such language occurred while in an official capacity. OTRD offered little to no evidence or argument that the policy applies to employees 24 hours a day, 7 days a week. This appeal regarding this allegation is sustained as a result of the inapplicability of the policy to Pettit’s conduct. As such, it is unnecessary to address the arguments of Pettit that she had a constitutional right to freedom of association and speech. Furthermore, for some reason, OTRD failed to offer or include in the record the proposed Exhibits which contained the alleged offensive photo.

The final allegation involves the confrontation of Hutson following his complaint. This is the only misconduct that has merit. Hutson had the right to make his complaint and OTRD had the responsibility to investigate. OTRD argues that Pettit should have known that Hutson would be cleaning that cabin when she entered. To the contrary, Hutson’s position was Front Desk Clerk and he “occasionally” cleaned cabins. There is insufficient evidence that Pettit specifically sought out Hutson or that she entered the cabin knowing that Hutson was in there. In fact, it appears that she inadvertently encountered him in the cabin. However, once she did encounter him, she should not have confronted him about the complaint. As a supervisor, Pettit knew or should have known the ramifications of such action, even if she believed the complaint was meritless. It was improper and misconduct to confront a subordinate employee concerning the filing of any complaint or grievance. It clearly appeared to be an act of attempted intimidation. Based upon the evidence and testimony, however, as mitigation, it does appear to be unintentional and brief, and was an isolated incident. It does warrant discipline, however, discharge for a long-term employee with no prior disciplinary history is unduly harsh. Given the

totality of the circumstances, this single incident of misconduct warrants a fourteen day suspension without pay. It should be noted that there is no evidence in the record of the consistency of discipline for other employees for the same or similar misconduct.

This Final Order provides for a reinstatement to the previous position. It also orders back pay and benefits to be restored, less the fourteen day suspension. The back pay, however, will not include the period from November 7, 2013 to July 23, 2015, the extended period that this matter was delayed because of the Sequoyah County action. The Appellant herself caused and/or contributed greatly to this undue delay in resolving this matter and that will not be rewarded with compensation for that period. The award of back pay is within the discretion of the undersigned. It is not an absolute right. Weighing all of the evidence and circumstances, this level of discipline is just and proper.

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 OTRD 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, suspended without pay or involuntarily demoted for misconduct and/or conduct unbecoming a public employee or other just causes.
5. The preponderance of the evidence supports OTRD's allegation of misconduct by Pettit in confronting her employee about a harassment complaint he filed against her. The preponderance of the evidence does not support OTRD's allegations of misconduct and conduct unbecoming a state employee for sending inappropriate texts or messages on personal time, for improper use of a state vehicle and for improper use of state property while on duty.

6. Appellee OTRD has met its burden to prove, by a preponderance of the evidence, that just cause exists to impose some level of discipline on Pettit for her misconduct and her appeal on that ground is denied.

7. Appellee OTRD has failed to meet its burden to prove, by a preponderance of the evidence, that the discipline of discharge was just and appropriate under the circumstances and consistent with progressive discipline, Merit rules and laws. As a result, the discipline imposed is unduly harsh and unfair given the totality of the evidence.

8. In accordance with OAC 455:10-9-2 (f) (1) (C), upon the finding that just cause existed for the adverse action, but did not justify the severity of the discipline imposed, the undersigned is ordering a reduction of the discipline. In ordering the reduction of discipline, the undersigned considered, at a minimum, the seriousness of the conduct as it relates to Pettit's duties and responsibilities; the previous employment and disciplinary records of Pettit; and other mitigating circumstances as discussed herein above.

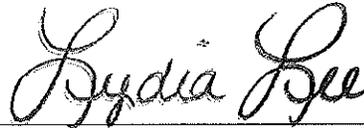
9. The record herein supports imposition of formal discipline in the form of a Suspension without Pay for fourteen (14) days as just and appropriate considering all of the facts and circumstances.

10. The record herein also supports reinstatement to her previous position and an award of back pay and benefits from the date of termination to November 7, 2013 and from April 28, 2016 to the date of reinstatement, less the fourteen day suspension without pay.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition for appeal of Appellant Waylie Pettit, 13-181 be **SUSTAINED in part and DENIED in part**, as provided in this Order. The discipline imposed upon Appellant is reduced to a suspension without pay consistent with this Order. Appellant is to receive back pay and benefits as set out in this Order and Appellant's personnel records are to be expunged consistent with this Order.

This Order entered this 16th day of June, 2016.



Lydia Lee
Administrative Law Judge

EXHIBIT "A"

At the conclusion of the administrative hearing in this matter, on April 28, 2016, the parties were granted leave to file written closing arguments. Appellant, Waylie Pettit, filed a pleading which included Proposed Findings of Fact and Arguments. Therefore, in compliance with 75 O.S. Section 312, rulings on each of the proffered Proposed Findings are made as follows:

FINDINGS OF FACT

1. The Victim's Protective Order was not offered as an Exhibit in this hearing and is not part of the record herein. There was testimony regarding the existence of the VPO, however this Finding goes into detail not contained in the record. This Proposed Finding is rejected for that reason.
2. Again, the VPO was not made part of the record and therefore, this Proposed Finding is rejected.
3. The record, including Joint Exhibit 8 and testimony of witnesses, supports the inclusion of this Proposed Finding and it has been incorporated into the Final Order issued herein.
4. This Commission does not possess the jurisdiction to enforce or make determinations about violations of the VPO. This Proposed Finding is rejected for that reason.
5. This Proposed Finding makes reference to information not offered as an Exhibit in this hearing and is not part of the record herein. Further, this information is not relevant to the determination regarding the disciplinary action herein. This Proposed Finding is rejected for those reasons.
6. This Proposed Finding is not relevant to the determination regarding the disciplinary action herein. This Proposed Finding is rejected for that reason.

7. This Proposed Finding has been incorporated into the Final Order issued herein.
8. This Proposed Finding has been incorporated into the Final Order issued herein.
9. This Proposed Finding somewhat misstates the evidence in this matter. As such, to the extent that it is not incorporated into the Final Order issued herein, this Proposed Finding is rejected for that reason.
10. This Proposed Finding has been incorporated into the Final Order issued herein.
11. This Proposed Finding misstates the evidence in this matter and is rejected for that reason.
12. This Proposed Finding somewhat misstates the evidence in this matter. As such, to the extent that it is not incorporated into the Final Order issued herein, this Proposed Finding is rejected for that reason.
13. This Proposed Finding has been incorporated into the Final Order issued herein.
14. This Proposed Finding has been incorporated into the Final Order issued herein.
15. This Proposed Finding has been incorporated into the Final Order issued herein.
16. This Proposed Finding is not properly a Finding of Fact, but rather is a statement of law. This Finding is rejected for that reason.
17. This Proposed Finding has been incorporated into the Final Order issued herein.
18. This Proposed Finding has been incorporated into the Final Order issued herein.
19. This Proposed Finding somewhat misstates the testimony in this matter. As such, to the extent that it is not incorporated into the Final Order issued herein, this Proposed Finding is rejected for that reason.
20. This Proposed Finding has been incorporated into the Final Order issued herein.
21. This Proposed Finding has been incorporated into the Final Order issued herein.
22. This Proposed Finding has been incorporated into the Final Order issued herein.
23. This Proposed Finding somewhat misstates the testimony in this matter. As such, to the extent that it is not incorporated into the Final Order issued herein, this Proposed Finding is rejected for that reason.
24. This Proposed Finding has been incorporated into the Final Order issued herein.
25. This Proposed Finding has been incorporated into the Final Order issued herein.

26. This Proposed Finding has been incorporated into the Final Order issued herein.
27. This Proposed Finding has been incorporated into the Final Order issued herein.

Paragraphs 28 through 38 represent the arguments of counsel, rather than Proposed Findings of Facts. As such, no formal determination will be made on these paragraphs.