

mitigating factors.

The record was opened and the hearing began. Joint Exhibits 1-7, Appellee Exhibits 1, 2, 3, 4, 5, 6, 9, 10, and 11, and Appellant Exhibits 7, 8, 10, and 11 were all introduced and admitted without objection. The following exhibits were introduced and admitted during testimony: Appellee Exhibits 7, 8, and 12, and Appellant Exhibits 1, 2, 3, 4, 5, 6, and 9.

Counsel for each party presented opening statements. Appellee presented the sworn testimony of three witnesses, offered one additional witness, but withdrew him with stipulations, and additional Appellee Exhibits were introduced as referenced above. At the conclusion of Appellee's case-in-chief, Appellant moved for a directed verdict, which was overruled and denied. Appellant presented the sworn testimony of seven witnesses, and additional Appellant Exhibits were introduced as referenced above. Counsel for each party presented closing statements, 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 case background, summary of testimony, findings of fact, conclusions of law, and order.

CASE BACKGROUND

Appellant was a permanent classified state employee, working in the OSHA Consultation Division (the "Division") of the Department. She had two separate terms of employment, with the longest running from 1982 until 1999. Ms. Gilliland returned to the Department in 2007, and worked at times as a Safety Consultant and at times as a Supervisor in the Division. At the time of the disciplinary action that is the subject of this appeal, Ms. Gilliland was working full time in the Division as a Safety Consultant Level IV.

Ms. Gilliland called in sick on March 13, 2013. Her supervisor, Jason Hudson ("Mr.

Hudson”), approved sick leave for the day. Ms. Gilliland also called in sick on March 14, 2013. Mr. Hudson approved sick leave for the day. On March 15, 2013, Ms. Gilliland called Mr. Hudson to inform him that she was still sick and would be absent from work. Mr. Hudson advised Ms. Gilliland that she was, on that date, out of sick leave and that she would need to present a doctor’s note for approval of leave of some type for the day. Ms. Gilliland subsequently provided a doctor’s note.

On March 18, 2013, the Department issued a written reprimand to Ms. Gilliland due to her conduct that the Department determined amounted to insubordination and inappropriate behavior towards her supervisors (the “Written Reprimand”). The Written Reprimand imposed on Ms. Gilliland a Corrective Action Plan (the “CAP”), which stated several requirements related to Appellant’s interaction with her subordinates, co-workers, supervisors, administrators, and Department customers. In addition, the CAP placed Ms. Gilliland on restricted leave, limiting her leave to sick leave supported by a doctor’s note and leave associated with a Family and Medical Leave Act (“FMLA”) qualifying event.

Four days later, on March 22, 2013, Ms. Gilliland sent an email to the proper supervisor informing the supervisor that Appellant had 2.5 hours of work week adjustment and .5 hours of comp time, and stating Appellant’s intention to leave work three hours early on that day. Ms. Gilliland did not wait for the supervisor’s approval of her use of work week adjustment and comp time, but left work at approximately 1:00 p.m. Approximately four hours and twenty minutes after Ms. Gilliland’s email, her supervisor responded that she did not approve Appellant’s request for leave. By that time, however, Ms. Gilliland had already left the building.

On April 2, 2013, the Department notified Ms. Gilliland that it was proposing the following disciplinary action: (1) imposing a three day suspension without pay; and (2) imposing

an adjustment of .5 hours comp time. The basis of the proposed disciplinary action, as stated in the notice, was: (1) insubordination – failure to follow supervisor directive; (2) conduct unbecoming a public employee; and (3) leave abuse by taking leave without following Department policy.

On April 15, 2013, Ms. Gilliland responded to the notice of Disciplinary Action by providing the Department a letter written by her counsel. On April 23, 2013, the Department issued its Notice of Final Action of Suspension Without Pay, in which it suspended Ms. Gilliland for three days without pay (the “Disciplinary Action”). The Disciplinary Action was, according to the notice, based on: (1) insubordination – failure to follow supervisor directive; (2) conduct unbecoming a public employee; and (3) leave abuse – violation of Department policy.

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.

SUMMARY OF TESTIMONY

The testimony of ten (10) witnesses, properly sworn and under oath, was taken and was made part of the record.

Jason Hudson

Jason Hudson (“Mr. Hudson”) is Assistant Director of the OSHA Consultation Division of the Department. He has been employed by the Department in the Division since 2005. Mr. Hudson worked in the Division’s Tulsa office until its closure, and now works out of his home in Tulsa. Mr. Hudson began working as Appellant’s direct supervisor on or about March 1, 2013, and was her direct supervisor during the occurrences related to the Disciplinary Action that led to this Appeal. Mr. Hudson stated that he became Ms. Gilliland’s supervisor because there had

previously been "issues" between Ms. Gilliland and her prior supervisor, Division Director, Diana Jones. When asked whether he had a good working relationship with Ms. Gilliland, Mr. Hudson responded, "I think she was a good person".

Mr. Hudson testified that Division and Department policy allows employees to take leave only after requesting it in writing from their supervisors and obtaining approval. Mr. Hudson identified Appellee's Exhibit 3 as an email he and others received from the Division director on January 18, 2013, outlining the leave policy. Mr. Hudson testified that he believed Ms. Gilliland understood the leave policy, as outlined in Appellee's Exhibit 3, because she requested leave from him after he became her supervisor. Mr. Hudson testified on cross-examination that he was not Ms. Gilliland's supervisor when the January 18, 2013, email regarding leave was sent, and that he has no direct knowledge of whether Ms. Gilliland followed or disregarded leave policies or procedure prior to becoming her supervisor on approximately March 1, 2013.

Mr. Hudson testified that Ms. Gilliland called him before 7:00 a.m. on the mornings of March 13, 2013 and March 14, 2013, to advise him that she was sick and would not be reporting to work. Mr. Hudson testified that he is not sure whether Ms. Gilliland had accrued sick leave on March 13 and March 14, 2013, but that he believes she did not. Mr. Hudson stated that he had no reason to doubt that Ms. Gilliland was sick on the days she called in.

When Ms. Gilliland called Mr. Hudson on Friday, March 15, 2013 to report that she was still sick and would not be in, Mr. Hudson stated that he informed her that she was out of sick leave and would need a doctor's note. Mr. Hudson testified that the telephone call was disconnected, and that he did not know whether Ms. Gilliland hung up on him, or the call was terminated for some other reason. Mr. Hudson stated that he called Ms. Gilliland back immediately, stated to her that the call had been disconnected, that she would need to present a

doctor's note, and that, as he would be out of the office the following week, she should present any necessary leave requests to Diana Jones. On cross-examination, Mr. Hudson testified that he did not recall saying anything else to Ms. Gilliland during either of the phone calls on March 15, 2013. He also stated that he didn't remember anything in the two calls that Ms. Gilliland said to him.

On direct examination, Mr. Hudson stated that he believed Ms. Gilliland was insubordinate during the March 15, 2013 phone calls, because when he informed her that she would need to present a doctor's note, she failed to inform him that she had already obtained one. On cross-examination, however, Mr. Hudson stated that he determined Ms. Gilliland was insubordinate during the first telephone call of March 15, 2013, because her tone was "not nice; not happy" and further because "she did hang up on me, or we got disconnected". He stated that during the phone calls of March 15, 2013, Ms. Gilliland did not use any disrespectful words or call him names or say that anything was bothering her, but that "well, there was silence". Later in cross-examination, when asked what about the March 15, 2013 phone calls indicated Ms. Gilliland's insubordination or premeditated hostility, Mr. Hudson initially said he couldn't remember, but eventually stated that his only evidence that Ms. Gilliland was insubordinate is that when he told her on March 15, 2013 that she would need to present a doctor's note, she did not indicate she already had one -- she withheld information. Mr. Hudson admitted that he does not know whether Ms. Gilliland had possession of the doctor's note at the time of the telephone call, but that the note is dated the day before the call. He testified that the note was not sent to him, but was faxed to the Oklahoma City office, and that he does not know whether the note was faxed by Ms. Gilliland or by her doctor.

Mr. Hudson identified Appellee's Exhibit 5 as the March 18, 2013 Written Reprimand

issued to Ms. Gilliland. He stated that he did not prepare the Written Reprimand in retaliation for Ms. Gilliland having filed a complaint with the Merit Protection Commission on March 15, 2013, and that on March 18, 2013 he was unaware that Ms. Gilliland had filed a complaint. Mr. Hudson initially testified that he personally prepared the Written Reprimand. On cross-examination, however, he waived. He admitted that he was out of the office at a training conference on March 18, 2013, when the Written Reprimand was prepared, but stated that he prepared the document on his laptop during conference breaks and emailed it to the Division. He eventually testified that Diana Jones helped create the Written Reprimand, and finally stated that he "helped create" the document on March 18, 2013. Mr. Hudson could not say which parts of the Written Reprimand he prepared, or which parts Ms. Jones wrote.

On direct examination, Mr. Hudson testified that the corrective action plan ("CAP") contained in the Written Reprimand was necessary because Ms. Gilliland had failed to follow instructions he had previously given regarding the use of Outlook Calendar, and because her time away from work was affecting her ability to do her job. On cross-examination, however, Mr. Hudson admitted that the Written Reprimand was based solely on his two telephone calls with Ms. Gilliland on March 15, 2013, and that Ms. Gilliland's use of Outlook Calendar was not mentioned in the document. Mr. Hudson stated that Ms. Gilliland should have known that her use of Outlook Calendar was part of the basis for the Written Reprimand, without written reference thereto in the Written Reprimand, because "we use it every day; she should know". Mr. Hudson could not recall whether he or Diana Jones initiated the idea of imposing a CAP on Ms. Gilliland, but stated that the terms of the CAP were a collaboration between him and Ms. Jones. Mr. Hudson admitted on cross-examination that the CAP contained no provision for meeting with Ms. Gilliland to review her progress, but stated that it was his intention to review her

progress on a daily basis. Mr. Hudson admitted part of the purpose a CAP is telling the employee who will review her progress, but that Ms. Gilliland's CAP gave no indication of who would review Ms. Gilliland's progress. Mr. Hudson admitted that the CAP did not indicate what Ms. Gilliland's scoring standard would be, but that the unstated standard would be Department policy. On re-direct, Mr. Hudson stated that no tolerance would be allowed for any deviation on Ms. Gilliland's part from the CAP requirements.

Mr. Hudson stated that the CAP restricted Ms. Gilliland's leave to sick leave supported by a doctor's note and sick leave associated with a Family and Medical Leave Act qualifying event. Mr. Hudson testified that Ms. Gilliland signed the Written Reprimand on March 18, 2013.

Mr. Hudson testified that he informed the Department employees under his supervision, including Ms. Gilliland, that he would be out of the office for training from March 18, 2013 until March 22, 2013. Mr. Hudson gave the notice by email dated March 14, 2013, which was admitted into evidence as Appellee's Exhibit 4. The email directed Ms. Gilliland and the others under Mr. Hudson's supervision to direct any requests for leave during his absence to the Division director, Diana Jones.

Mr. Hudson testified that on March 22, 2013, only four days after being placed on restricted leave pursuant to the written reprimand, Ms. Gilliland sent an email to Diana Jones that Mr. Hudson interpreted as a request for leave. Mr. Hudson identified the email from Ms. Gilliland to Ms. Jones as Page One of Appellee's Exhibit 6, which reads as follows:

Diana
I have 2.5 hrs or work week adjustment and 0.5 hrs of comp in February. I was planning on leaving at 1:00

Ann

Mr. Hudson stated that Ms. Gilliland's request for leave, as made in her March 22, 2013 email to

Ms. Jones did not comply with the restrictions placed on Ms. Gilliland by the written reprimand because, though he did not approve the one-half hour of comp time, Ms. Gilliland took the time anyway. On cross-examination, Mr. Hudson stated that Ms. Gilliland's email to Ms. Jones was insubordinate because Ms. Gilliland did not ask for leave, but just stated that she was leaving. Mr. Hudson stated that he did not recall talking to Ms. Gilliland about using comp time as quickly as possible.

Mr. Hudson identified Appellee's Exhibit 9 as a Notice of Proposed Disciplinary Action, dated April 2, 2013 (the "Notice of Proposed Discipline"), issued to Ms. Gilliland for taking one-half hour of comp time on March 22, 2013, without approval. On direct examination, Mr. Hudson testified that he personally created pages three, four and five of the notice with the help of Diana Jones, as was standard practice. Mr. Hudson stated that he did not issue the notice for retaliatory reasons, and that he never colluded with anyone to make the work environment inhospitable for Ms. Gilliland. He stated that all Division employees, including him, were required to follow the same leave policies imposed on Ms. Gilliland. On cross-examination, Mr. Hudson indicated that he was the author of the Notice of Proposed Disciplinary Action, that Ms. Gilliland's use of Outlook was not a basis for the document or the Disciplinary Action, and that the only basis for the Disciplinary Action was Ms. Gilliland's unauthorized use of one-half hour of comp time. Mr. Hudson testified that he has never suspended another Department employee for unauthorized use of one-half hour of comp time. On re-direct, however, Mr. Hudson agreed with the Department's attorney that in addition to the half-hour of unauthorized comp time, insubordination and conduct unbecoming a public employee were stated as reasons for the Disciplinary Action in the Notice of Proposed Disciplinary Action, and that past problems with Ms. Gilliland were considered in imposing discipline.

On cross-examination, Mr. Hudson testified that he received a copy of a letter prepared by Ms. Gilliland's attorney in response to the Notice of Proposed Disciplinary Action, and identified the letter as Appellee's Exhibit 10 (the "Response Letter"). Mr. Hudson stated that he took no action to investigate Ms. Gilliland's workplace stress that is raised in the Response Letter, and that he did not ask anyone to investigate the matter. He testified that he knew that Ms. Gilliland was ill, that her mother was ill, that her father was ill, and that her uncle died, but that he did not investigate whether any of this was creating workplace stress for Ms. Gilliland because he saw it as a personal matter and thought Ms. Gilliland would come to him if she was experiencing workplace stress. Mr. Hudson stated on re-direct that Ms. Gilliland never came to him complaining of workplace stress. Mr. Hudson stated that he did not investigate Ms. Gilliland's medical history, as raised in the Response Letter, because he believed it to be a private matter into which he could not inquire. Mr. Hudson admitted that he did not review Ms. Gilliland's prior PMPs at the time the Disciplinary Action was considered, but that he had reviewed them when he became Ms. Gilliland's supervisor in early March of 2013.

Mr. Hudson testified that he considered Ms. Gilliland's performance under her CAP in determining to impose Disciplinary Action. However, when asked how Ms. Gilliland performed under the CAP, Mr. Hudson responded that "I don't know if we actually documented anything on those". He stated that they probably had reviewed her performance under the CAP about the same time, but couldn't say when. Mr. Hudson eventually admitted that Ms. Gilliland's performance under the CAP was not part of the basis for the Disciplinary Action, and reiterated that the Disciplinary Action was based solely on the unauthorized use of one-half hour comp time. When asked whether the Disciplinary Action was based at all on the CAP, Mr. Hudson responded, "as part of the disciplinary process, you have to use the Written Reprimand to get to

the suspension". On re-direct, Mr. Hudson stated that in determining discipline he takes past disciplinary action into consideration, but feels no need to list them all.

On cross-examination, Mr. Hudson testified that he is not aware of any employee Ms. Gilliland's age being forced to retire from the Department. He stated that he recalls Department employees Bill Ward, Irving Love, Bobby Rumsfeld, Cheryl Williams, Donny Watts, and Ila Sutton, but doesn't know of any workplace pressure being placed on any of them, and knows that some of them retired voluntarily. Mr. Hudson stated that he has never used the term "Fraternity Hazing" with regard to any Department employee, and that he never heard any other Department employee use the term. Mr. Hudson stated that he was never a part of any conversation to force any Department employee out of his or her job.

Diana Jones

Diana Jones has worked at the Department for approximately thirty years. Ms. Jones currently works as Director of the Division, and worked in such capacity at the time of the occurrences related to the Disciplinary Action and this Appeal. As Director, Ms. Jones is responsible for overseeing the operations of the Department, preparing grant applications, budgeting, staffing, and ensuring that Department policies are followed by the Division and its employees.

Ms. Jones was Ms. Gilliland's direct supervisor until approximately March 1, 2013, when Ms. Gilliland's work duties were modified and Ms. Gilliland was placed under the supervision of Jason Hudson. Ms. Jones stated that the Division removed Ms. Gilliland's supervisory responsibilities due to the Department making various changes in organizational structure, and that Ms. Gilliland's change in duties had not been made to discipline or retaliate against Ms. Gilliland. On cross-examination, Ms. Jones stated that the Department reorganization was made

necessary due to federal sequestration cuts and to improve performance of the Division.

Ms. Jones testified that her relationship with Ms. Gilliland has varied over the years and that over the last couple of years, their relationship has been negatively impacted by negative changes in Ms. Gilliland's attitude and work performance. Ms. Jones testified that she had various conversations with Ms. Gilliland regarding her attitude over time, stemming from simple questions like, "what's bothering you", to more formal discussions regarding Ms. Jones' concerns related to Ms. Gilliland's performance. Ms. Jones testified that Ms. Gilliland at times seemed angry and that she was curt or short during her conversations with Ms. Jones.

Ms. Jones testified that in the months leading up to Ms. Gilliland's suspension, Ms. Gilliland had had several FMLA qualifying events related to her own illness and those of both of her parents. Ms. Jones stated that she never challenged Ms. Gilliland's requests for FMLA leave.

On direct examination, Ms. Jones testified that Ms. Gilliland never approached her about experiencing workplace stress, but that Ms. Gilliland did talk about how her personal issues were hard for her. Ms. Jones could not recall Ms. Gilliland ever requesting any workplace accommodation. On cross-examination, Ms. Jones testified that Ms. Gilliland had approached her with concerns about the treatment of several other Division employees. Ms. Jones assumed, though, that Ms. Gilliland was approaching her on the subject to make sure that Ms. Jones was aware of the situations, and she does not recall Ms. Gilliland indicating the treatment of other employees created workplace stress for Ms. Gilliland. Ms. Jones stated that each of the employees Ms. Gilliland raised concerns about was over the age of forty, but could not recall whether each of them had resigned or retired. Ms. Jones denied seeing any employee harassed or forced to retire.

Ms. Jones testified that Department policy requires employees to request leave in writing

three days in advance. Policy requires employees to request sick leave by contacting their supervisor directly by telephone by 7:00 a.m. on the day sick leave is needed. Policy states that leave is not automatic and that employees must obtain the approval of their supervisors prior to taking leave. Ms. Jones stated that the leave policy applies to all employees, and that no specific leave requirement was imposed on Ms. Gilliland. Ms. Gilliland never told Ms. Jones she did not understand the Department leave policy.

Ms. Jones testified that the Division utilizes Outlook Calendar to document work of its employees and to budget time. She stated that Ms. Gilliland was sometimes deficient in maintaining her Outlook Calendar, that there were gaps in information provided, and that some days Ms. Gilliland made no Outlook entries at all. Ms. Jones testified that she asked Ms. Gilliland to correct the problem, that Ms. Gilliland did temporarily correct the problem, but that Ms. Gilliland's deficiency in this area was an ongoing problem. On cross-examination, Ms. Jones admitted that Ms. Gilliland's use of Outlook Calendar was not mentioned in the Written Reprimand, or in any way related to the Disciplinary Action. Ms. Jones also testified on cross-examination that she is aware that the Department is required to give an employee notice before imposing discipline, and that the notice must state the reasons for the discipline.

Ms. Jones testified that she and Mr. Hudson collaborated on the creation of the Written Reprimand. She stated that, although Mr. Hudson was at a training conference the week of March 18, 2013, he was able to participate in the drafting of the Written Reprimand because he had limited ability to communicate with Ms. Jones by phone and email during breaks in his training. Ms. Jones stated that while she and Mr. Hudson did communicate regarding the creation of the Written Reprimand during his training, they did not have a lot of communication. Ms. Jones later testified that she began creating the Written Reprimand on March 15, 2013,

incorporating quotes Mr. Hudson gave her from the telephone calls he had with Ms. Gilliland that morning. She finally indicated that she prepared the Written Reprimand and Mr. Hudson reviewed it.

On cross examination, Ms. Jones stated that she was not a party to the phone calls between Ms. Gilliland and Mr. Hudson. She did not contact Ms. Gilliland to get her side of the story regarding the telephone conversations, and felt justified in this because she had no reason to believe Mr. Hudson was inaccurate in his report and Ms. Gilliland's prior behavior was consistent with Mr. Hudson's report. Ms. Jones stated that she decided to issue the Written Reprimand on the day Mr. Hudson reported the calls, March 15, 2013, and had time to contact Ms. Gilliland for her side of the story prior to issuing the Written Reprimand on March 18, 2013. When asked on cross-examination whether the Written Reprimand was based on the two phone calls between Mr. Hudson and Ms. Gilliland, Ms. Jones answered that the Written Reprimand was based on Ms. Gilliland's "consistent insubordinate behavior". Ms. Jones acknowledged, however, that the Written Reprimand does not mention consistent insubordinate behavior, but mentions only the phone calls.

Ms. Jones testified on cross-examination that she could not recall whether she or Mr. Hudson placed the term "disrespect" in the Written Reprimand, but stated that the term was used because Ms. Gilliland had shown disrespect for Mr. Hudson by: (1) failing to tell Mr. Hudson that she already had a doctor's note when he told her she would need one during the phone calls; and (2) Ms. Gilliland and Mr. Hudson's "total interaction" and on the "trouble they had communicating". Ms. Jones stated that the term "insubordination" was used in the Written Reprimand because it is behavior she had seen for a while from Ms. Gilliland, and was not just based on the telephone calls between Mr. Hudson and Ms. Gilliland. Ms. Jones stated that Ms.

Gilliland was insubordinate because the phone call was “disconnected”, because of Ms. Gilliland’s tone of voice during the calls, and because Ms. Gilliland withheld information that she already had a doctor’s note. Additionally, on re-direct examination, Ms. Jones agreed with Department counsel that Ms. Gilliland telling Mr. Hudson during the phone call that Mr. Hudson’s question was weird was insubordinate, and that her refusal to answer Mr. Hudson’s question was insubordinate. She stated that when she and Mr. Hudson discussed the phone calls, they determined that Ms. Gilliland had been insubordinate. Ms. Jones stated that it was her idea to use the term “premeditated hostility” in the Written Reprimand, and that she felt the term was accurate based on Mr. Hudson’s report of the phone calls to her.

Ms. Jones stated that she created the terms of the CAP contained in the Written Reprimand and that the CAP was her idea. She testified that she and Mr. Hudson were to monitor Ms. Gilliland’s progress under the CAP, but admitted on cross-examination that neither the CAP nor the Written Reprimand indicate who would review Ms. Gilliland’s CAP progress. She stated on direct examination that no level of non-compliance with the CAP requirements would be acceptable, but agreed on cross-examination that the method of scoring CAP progress is not stated in the CAP or Written Reprimand. On cross-examination, Ms. Jones stated that Ms. Gilliland’s CAP progress was to be reviewed at the end of ninety days, but agreed that neither the CAP nor the Written Reprimand so stated. Ms. Jones stated that the purpose of placing Ms. Gilliland on restricted leave was to help Ms. Gilliland catch up with her reports of client consultations, to keep her on track to meet performance goals, and to build up Ms. Gilliland’s leave balance. On cross-examination, however, Ms. Jones agreed that the Written Reprimand does not say Ms. Gilliland is behind on her reports, though it does say her leave will be limited until her job performance increases to her PMP goals. Ms. Jones agreed that the CAP made no

reference to comp time, and stated that she had not approved any comp time for Ms. Gilliland after the Written Reprimand was put in place. Ms. Jones stated that she did not issue the Written Reprimand to retaliate against Ms. Gilliland, and that she was unaware Ms. Gilliland had filed an MPC Complaint when she prepared the Written Reprimand.

Ms. Jones testified that when Ms. Gilliland emailed her on March 22, 2013, advising her that she planned to use 2.5 hours of work adjustment and .5 hours of comp time to leave early that day, Ms. Jones was, herself, away from the office on leave. She stated that Division employees are encouraged to call her if she is away from the office, and that Ms. Gilliland has her telephone number. Ms. Jones testified that she denied Ms. Gilliland's request to leave early on March 22, 2013 as soon as she saw Ms. Gilliland's email request, but that Ms. Gilliland had already left. Ms. Jones stated that Ms. Gilliland's departure without approval was improper. When asked if she was aware that Ms. Gilliland claims Mr. Hudson told her to get comp time off the books as quickly as possible, Ms. Jones answered that she was not. Ms. Jones then stated that she had asked Mr. Hudson if he had instructed Ms. Gilliland to get comp time off the books quickly, and that Mr. Hudson had denied giving the instruction. On cross-examination, she stated that she did not contact Ms. Gilliland to discuss Mr. Hudson's denial of the instruction.

Ms. Jones stated she was aware Mr. Hudson issued the Notice of Proposed Disciplinary Action to Ms. Gilliland, and was aware of the circumstances leading to it. She stated that the basis of the proposed Disciplinary Action was: (1) Ms. Gilliland's unauthorized use of one-half hour of comp time; (2) her continued insubordination; (3) her failure to follow instructions; and (4) her failure to follow policy. However, when asked on cross-examination whether Ms. Gilliland's unauthorized use of one-half hour of comp time was the sole basis of the Disciplinary Action, Ms. Jones answered, "Yes, which was insubordinate". Ms. Jones stated that she has

personally talked to Division employees about the need to follow Department policy, and has specifically talked to Ms. Gilliland about following leave policy. She stated that the term "continued" was used in the Notice of Proposed Disciplinary Action because "it's happened more than once". Ms. Jones testified that, prior to issuing the Notice of Proposed Disciplinary Action, she had personally worked with Ms. Gilliland to address the concerns, and had seen Mr. Hudson work with her. Ms. Jones had previously met monthly with Ms. Gilliland to review her performance, but stated that Ms. Gilliland had not participated in monthly meetings with Mr. Hudson, because Ms. Gilliland had been on leave. Ms. Jones stated that in evaluating Ms. Gilliland's performance, she took Ms. Gilliland's time away from the office for FMLA and sick leave into account. Ms. Jones acknowledged Ms. Gilliland's 2009 mid-year PMP, but stated that the performance indicated therein does not necessarily reflect Ms. Gilliland's performance at a later time. On cross-examination, Ms. Jones stated the 2009 mid-year PMP was complimentary of Ms. Gilliland. Ms. Jones stated that Ms. Gilliland "does a great job in the field with the employers".

Ms. Jones testified that she has never colluded with any Department employee to create a hostile work environment, that she has never used or heard anyone else use the term "fraternity hazing", and that she never met with Chief of Staff Jim Marshall about terminating Ms. Gilliland. She stated that her only conversations with Human Resources Director, Oleda Hix, on employment matters were limited to discussions of procedures to evaluate employees in general.

Ms. Jones testified that her goal in taking disciplinary action with Ms. Gilliland was to see her improve and meet performance standards. She stated that Ms. Gilliland was a skilled and valuable employee because of her understanding of OSHA regulations and her rapport with Division employees and consultation customers, but that she also had "problematic issues". Ms.

Jones stated that she did not hold Ms. Gilliland to a higher standard than any other employee, did not impose any unique policy on Ms. Gilliland, and did not pick on Ms. Gilliland.

Oleda Hix

Oleda Hix ("Ms. Hix") is the Human Resources Director for the Department. Ms. Hix testified that Ms. Gilliland received 40 hours of shared leave donated by Department employee, Bobby Rumsfeld, on January 9 or January 10, 2013. Ms. Gilliland was allowed to use the 40 hours of shared leave donated by Mr. Rumsfeld between April 12, 2013, and April 19, 2013 because she had run out of other leave. Ms. Hix testified that she had provided Ms. Gilliland FMLA packets related to her parents' illnesses, but Ms. Gilliland had not returned the forms.

There was some question about Ms. Gilliland's ability to use shared leave and the application of FMLA leave to Ms. Gilliland's time during the month of February, 2013. The matter was addressed in a chain of emails between Ms. Gilliland, Ms. Jones, and Ms. Hix, as set forth in Appellee's Exhibit 12. Ms. Hix testified that she would review a request for shared leave and take the matter to Department Chief of Staff, Jim Marshall, with a recommendation for action. Mr. Marshall would make the final determination. Ms. Hix testified that in February, 2013, Ms. Gilliland was not entitled to use shared leave because she had other leave available. Ms. Hix testified that the Department never denied Ms. Gilliland use of any shared leave she was entitled to take.

Ms. Hix stated that she never met with Jim Marshall to talk about harassing Ms. Gilliland or deny her leave. She stated that she never coached Division supervisors on how to discharge employees, but advised them on how to document progressive discipline. She never observed any Department employee express a desire to discharge Ms. Gilliland. Ms. Hix testified that she never manipulated Department records.

On cross-examination, Ms. Hix agreed that Ms. Gilliland's use of shared leave was not the basis for the Disciplinary Action. She testified that Bobby Rumsfeld did ask to donate another 40 hours of leave to Ms. Gilliland, but that the gift was not allowed because, at the time, Ms. Gilliland had other forms of leave available. Ms. Hix stated that she has never authorized a gift of shared leave to an employee unless the recipient employee is out of leave.

Jim Marshall

Appellee called Jim Marshall ("Mr. Marshall"), and Mr. Marshall was sworn in. Appellant objected to Mr. Marshall testifying on the ground that Mr. Marshall had no first hand knowledge of the circumstances leading to the Written Reprimand or the Disciplinary Action. Appellee offered to withdraw Mr. Marshall if Appellant would stipulate that: (1) Mr. Marshall made the final decision to impose the Disciplinary Action; and (2) Mr. Marshall would testify that he considered the Notice of Proposed Disciplinary Action sent to Ms. Gilliland in making his final decision regarding the Disciplinary Action; and (3) Mr. Marshall would testify to the accuracy of the statements made in Appellee Exhibit 1, Page 11 and the reasons stated therein for the change to Ms. Gilliland's duties. Appellant accepted the stipulations, the stipulations were entered, and Mr. Marshall was excused.

Cheryl Williams

Cheryl Williams ("Ms. Williams") worked for the Department as Finance Director from January 11, 2011, until July 13, 2012. She believed Ms. Gilliland to be a hard worker, "always at her desk" and knew that she had received work-related awards. She observed Ms. Gilliland to be professional, soft-spoken, kind, and "faithful to the mission of the Department". Ms. Gilliland always seemed to get along with everyone and do her work. On cross-examination, however, Ms. Williams stated that she did not work directly with Ms. Gilliland, did not see her every day,

never saw her working with Ms. Jones in the Division on business matters, did not observe any interaction between Ms. Gilliland and her supervisors on March 13, 14, 15, or 22 of 2013, never did a PMP for Ms. Gilliland, is not familiar with Ms. Gilliland's disciplinary record, didn't know Ms. Gilliland's leave record in 2012 or 2013, and has no knowledge of Ms. Gilliland's PMPs,

Ms. Williams testified that she observed several Department supervisors, including Jim Marshall, Diana Jones, Oleda Hix, and various Division directors participate in what she called "whisper campaigns". It is Ms. Williams' belief that these "whisper campaigns" were attempts by their participants to systematically target one Department employee after another for "methodical destruction" of the person's character with the goal of spreading rumors about the targeted employee and driving the targeted employee to levels of stress that would force him or her to retire. Ms. Williams' evidence of these "whisper campaigns" included witnessing meetings between Jim Marshall and others in which the participants were whispering. She admitted that she had no idea what the participants to the conversations were saying, but believed that the conversations were inappropriate because more than one division head was in the room with the Department Chief of Staff or the HR Director. On at least one occasion, Ms. Williams would receive instruction as to what to do with "her employee" immediately following a "whisper session".

Although Ms. Williams testified on cross-examination that these "whisper campaigns" occurred "all day long; all the time", she could name only herself, Cindy Sullivan, Tom Monroe, and Ila Sutton as targets of "whisper campaigns". Ms. Williams testified that she unwittingly participated in the targeting of Ila Sutton, who was an employee she directly supervised. Ms. Williams believed that Jim Marshall manipulated conversations to turn Ms. Williams against Ms. Sutton. She stated that she met with Jim Marshall about Ms. Sutton, but that the meetings were

not “whisper sessions”. She testified that she had “inappropriate” conversations with Oleda Hix regarding Ms. Sutton.

Ms. Williams testified that she was terminated from the Department as the result of a “whisper campaign” against her. She testified to other actions on the part of Department leadership that she considered inappropriate. Many of the allegations are contained in Ms. Williams email dated August 27, 2013, addressed to Ms. Gilliland, introduced as Appellant’s Exhibit 1.

Ms. Williams testified that on one occasion, Ms. Jones advised Ms. Gilliland that she and other Division employees going to a seminar in Kansas City would not receive per diem allowances because they were driving a Department vehicle. Ms. Williams advised Ms. Jones that the employees were entitled to per diem allowances, but Ms. Jones only relented and approved the per diem after Mr. Marshall intervened. In addition, Ms. Williams testified that she never saw Ms. Jones be pleasant to Ms. Gilliland. She observed Ms. Jones snap at Ms. Gilliland, observed her walk by Ms. Gilliland without speaking, and observed her being rude to Ms. Gilliland.

On cross-examination, Ms. Williams stated that she was terminated from the Department, and described her termination as a stressful and rattling event. She stated that she was not angry at the Department when she was terminated, but was hurt. She stated that today, she is not angry at the Department, but thankful that she no longer works there. She stated that her feelings toward the Department did not influence her testimony.

The undersigned did not find Ms. Williams credible, and gave no weight to her testimony.

Andrew McBride

Andrew McBride ("McBride") worked for the Department in the Division from October 22, 2009, until approximately November 23, 2012. Mr. McBride's last assignment at the Department was as a full time safety consultant. Mr. McBride currently works as a safety director in private industry.

Mr. McBride testified that Ms. Gilliland was a "great" supervisor. She taught him the OSHA standards, helped train him, and helped him conduct consultations. He testified that no safety consultant working under Ms. Gilliland would say anything other than "you won't find a better supervisor". Mr. McBride testified that Ms. Gilliland was never curt, disrespectful, and would never raise her voice. She was always professional and tactful in the workplace. Mr. McBride stated that Ms. Gilliland had a unique way of engaging people and was appreciated by the Division customers. He believed that Ms. Gilliland played a major role in the Division's success and in the Division receiving awards.

Mr. McBride stated that all Division employees "would say they received unethical treatment" by the Department leadership. On cross-examination, Mr. McBride stated that he spoke to each Division employee, and to a man, each said he was treated unethically. Mr. McBride stated that the unethical treatment started in the Spring of 2011, and was discussed by Division employees every time Ms. Jones was out of the office.

Mr. McBride saw a supervisor, Barry Montgomery, attack Bobby Rumsfeld about Mr. Rumsfeld not getting his work done and not staying in his office area when Mr. McBride believed the criticism to be unfair or inaccurate. Mr. McBride stated on cross-examination that he did not raise his concerns over Mr. Rumsfeld's treatment with the Department grievance officer, Oleda Hix.

Mr. McBride testified that he saw Jason Young, a Department Supervisor, pick on

Department Employee Bill Ward, and was told by Mr. Young that the Department was trying to “push Bill out”. Mr. McBride testified that Mr. Young showed him emails indicating the Department was “building a case file” against Mr. Ward. Mr. McBride testified that he reported his concerns over Mr. Ward’s treatment to Jim Marshall. On cross-examination, Mr. McBride stated that Mr. Young was Mr. Ward’s supervisor and, as such, was responsible for evaluating Mr. Ward.

Mr. McBride stated that targeted employees would receive badgering, rude, nitpicking emails from supervisors. Mr. McBride testified that each of the employees he believed to be targets of this conduct were “older employees”.

Mr. McBride testified on cross-examination that Diana Jones was “well aware of the badgering” older Division employees were receiving and that Division employees were obviously bothered and uncomfortable about it. He stated that Ms. Jones was “secretive and hidden in general”. On cross-examination, Mr. McBride clearly indicated he believed Ms. Jones was the root of the problem in the Division, stated that he would still be working at the Department “but for Diana Jones”, and stated that he believes Ms. Jones’ behavior to be the reason other safety consultants left the Department as well. Mr. McBride stated that the atmosphere in the office was never good.

Mr. McBride testified that he met with Department Chief of Staff, Jim Marshall, about a year before he left the Department over concerns about how the Division was being run. He stated that lots of consultants were leaving the Division, and there was a “very unpleasant, unhappy atmosphere”. As a result of the meeting, Mr. Marshall advised Mr. McBride that he would prepare forms for Department employees to evaluate their supervisors, but to his knowledge, no form was ever prepared.

When asked whether he was angry at the Department when he left, Mr. McBride answered that he was very unhappy with Diana Jones. Mr. McBride stated that he did not let those emotions taint his testimony.

Erica Ward

Erica Ward ("Ms. Ward") worked as an industrial hygienist at the Department from January, 2010, until May, 2012. Ms. Ward knew Ms. Gilliland, received some training from her, and worked with her on a few cases. Ms. Ward found Ms. Gilliland to be a friendly, positive, respectful person who was approachable with clients. She was impressed with Ms. Gilliland's high morals, ethics, and integrity. She stated that Ms. Gilliland was always approachable and was very much liked by her coworkers. Ms. Ward never saw Ms. Gilliland lose her temper, raise her voice, be discourteous, or be dishonest. Ms. Ward believes Ms. Gilliland always conducted herself in an admirable and respectful way.

Ms. Ward testified that she was disappointed with Diana Jones and the work environment in the Division. She stated that there was "daily negativity" and that upper management was discourteous, micromanaged employees, and made workers and the working environment uncomfortable. She stated that she observed Diana Jones being disrespectful and discourteous to Ms. Gilliland, but never saw Ms. Gilliland be discourteous to Ms. Jones.

On cross-examination, Ms. Ward testified that when she resigned from the Department in May of 2012, she was unhappy with the Department. She stated that she was not upset with the Department at that time, but that she "just didn't like my job". She stated that she has no emotion about the Department today, and that her feelings did not impact her testimony. Ms. Ward admitted that she was not employed at the Department in 2013, and did not observe any facts directly related to the Disciplinary Action.

Lawrence Norfar

Lawrence Norfar ("Mr. Norfar") was employed as a safety consultant in the Division from September 22, 2003, until September 21, 2011. He has ten years active duty with the United States Air Force, and ten years in the United States Air Force Reserve.

Mr. Norfar trained Ms. Gilliland when she returned to the Division. She eventually became his supervisor. Mr. Norfar observed Ms. Gilliland to be "extremely professional" and stated that she helped him find answers to his clients' questions. He stated that Ms. Gilliland was dedicated to the mission of the Department, was always professional, and that she would react to unprofessional conduct by others in the field in a calm manner. He never saw Ms. Gilliland become angry, raise her voice, hang up the phone during a conversation, be discourteous with anyone, including her supervisors, and believed that Ms. Gilliland was always truthful with the Department, her clients, and Mr. Norfar as an employee.

Mr. Norfar testified that Ms. Gilliland was once the victim of a crime in which she was injured, but that her injury did not affect her performance in the workplace. On cross-examination, Mr. Norfar stated that Ms. Gilliland missed two to three weeks of work after the crime and that, to the best of his knowledge, her supervisors at the Department accommodated her for being out.

Mr. Norfar testified on cross-examination that he did not work for the Department in 2013, did not observe any interaction between Ms. Gilliland and her supervisors in 2013, including March of 2013, and was never part of any disciplinary discussion between Ms. Gilliland and her supervisors, formal or informal.

Ila Sutton

Ila Sutton ("Ms. Sutton") worked for the Department from 1987 until December 31,

2011, as a contract administrator. She worked for approximately six different Commissioners of Labor, and did not find their management tactics to be similar.

Ms. Sutton knew Ms. Gilliland during both of Ms. Gilliland's terms of employment at the Department. Ms. Sutton never worked directly with Ms. Gilliland, but saw her every day. To Ms. Sutton, Ms. Gilliland seemed professional and knowledgeable, seemed to work well with other people, and was loved by business she consulted with on behalf of the Department. She stated that Ms. Gilliland was very dedicated to the Department; that "her job was her life". Ms. Sutton stated that she never saw Ms. Gilliland lose her temper, yell at a supervisor, be discourteous to a supervisor, hang up the phone, get loud, or act with disrespect. On cross-examination, Ms. Sutton stated that she never accompanied Ms. Gilliland into the field, and so she does not know first hand that Ms. Gilliland is "great with the public".

Ms. Sutton testified that she believed the Department Chief of Staff, Jim Marshall, came into the Department to "get rid of people". She believed that Mr. Marshall was "after me to get me out". She stated that Mr. Marshall would pit her and her boss against each other by telling her one thing and her boss another. She stated that the Department was an unpleasant workplace, and that she believed Ms. Gilliland was subjected to the same treatment. On cross-examination, Ms. Sutton stated that she left the Department because she "couldn't stand the harassment from Cheryl Williams or Jim" Marshall anymore. She stated that as soon as she told Ms. Williams and Mr. Marshall that she was retiring, the harassment stopped. Ms. Sutton said that the harassment was about "everything". She stated that everything she gave her supervisor was wrong, but no explanation would be given. She stated that she took her concerns about her treatment to the grievance manager, Oleda Hix, and to the Chief of Staff, Jim Marshall, but nothing ever came of her complaints.

Anthony Thomas

Anthony Thomas ("Mr. Thomas") worked at the Department from December, 2008, until September, 2011, as a labor compliance officer in the Employment Standards Division. He met Ms. Gilliland at the Department and interacted with her, on average, four to five times per week. Mr. Thomas observed Ms. Gilliland to be pleasant, always cordial, and always respectful. She seemed committed to her work. Mr. Thomas never saw Ms. Gilliland lose her temper, be abrupt or curt, yell, speak out of turn to her supervisor, be loud or inappropriate, hang up the phone during a conversation, or disrespect anyone.

On cross-examination, Mr. Thomas stated that he worked in a separate division than Ms. Gilliland, that he never worked directly with Ms. Gilliland, and that he never observed Ms. Gilliland interact with her supervisors, including any time during 2013. He stated that he never participated in any informal or formal disciplinary discussions regarding Ms. Gilliland.

Ann Gilliland

Ms. Gilliland testified that her health was not good in March, 2013; that she had "had a rough year". She stated that at the time she was trying to make difficult decisions regarding aging parents. In March, 2013, her mother's health was alright, but her father was placed in a facility due to his ailing health. She decided to keep her mother at home. She made numerous trips to the hospital at 3:00 a.m. and still made it to work the same day. In addition, her uncle was involved in an accident, drowned, and was put on life support. Ms. Gilliland had to break the news to her father and deal with her uncle's death. With all of this occurring around March, 2013, Ms. Gilliland testified that she still made an effort to get to work. She stated that she loved her work, loved the interaction with her co-workers and clients.

Ms. Gilliland stated that in the "early days of PMPs," she received several PMPs that

were perfect 4.0s, a couple of PMPs graded between 3 and 4, and a couple of PMPs graded between 2 and 3. She stated that her average PMP score was 3.46. On cross-examination, Ms. Gilliland testified that although in 2013, PMPs were no longer scored, the PMPs she received in 2013 were “low because they were piling on me”, because she had a low number of consultations, and because of “the FMLA issue”. She admitted that her 3.46 average PMP score does not include her most recent term of employment.

Ms. Gilliland testified that she received eight letters of commendation for her work in the Division. On cross-examination, she stated that she has taken positive items like commendation letters to Oleda Hix to be placed in her employment file, but the items were never placed in her file. Ms. Gilliland testified that she never yelled at anyone at work, never raised her voice to a supervisor, never hung up a phone on anyone, and was never discourteous to her supervisors.

Ms. Gilliland testified that she observed a pattern of the Department targeting employees age 50 and up with unfair treatment. She doesn't remember the exact time frame in which she first noticed a pattern, but knows “it was all around the same time”. On cross-examination, Ms. Gilliland agreed that she never heard a Department employee say, “Let's go after everyone over fifty”, but stated that “they just started picking them off one at a time”.

Ms. Gilliland testified that the Department “targeted” Bill Ward. Ms. Gilliland saw emails from Jason Hudson showing that “they” had taken pictures of Bill Ward and knew that “they” were barraging Mr. Ward with emails. Ms. Gilliland testified that Diana Jones told her that “they were even videotaping them”, and that she told Ms. Jones the Department needed to stop doing so. Ms. Gilliland stated that Ms. Jones told her “Bill Ward has said this is like a fraternity hazing”. On cross-examination, Ms. Gilliland stated that she saw the pictures of Bill Ward, and that they showed his eyes closed. When asked if this was appropriate in the office,

Ms. Gilliland said it would be if Mr. Ward was taking a rest break from his computer. Ms. Gilliland stated that this is “not how you treat a seventy year old employee since 1987, by haranguing him by a bunch of young guys”.

Ms. Gilliland also believed the Department was “targeting” Irving Love. Mr. Love was close to 65 years old. Ms. Gilliland heard Ms. Jones “snickering that she had caught him in a casino”, but Ms. Gilliland stated she knew that the allegation was untrue. Ms. Gilliland believes the Department intentionally “fanned panic” about budget cuts and sequestration to make employees believe their jobs were not secure. She testified that they offered employees “buy-outs of \$5,000” and told them they risked being “riffed” and would be unable to draw unemployment if they did not accept the buy-out. Ms. Gilliland stated that the employees were led to believe that the Tulsa office would be closed, and that it was beyond anyone’s control. Ms. Gilliland testified that the Department Chief of Staff, Jim Marshall, told her personally about the pending sequestration, budget cuts, and impact on the Department, “It’s going to happen, Ann”. Ms. Gilliland testified that Mr. Love took the “early buy-out” only to find that the sequestration cuts were a fraction of what the Department said that they would be, that no state budget cuts occurred, and that the Tulsa office remained open. On cross-examination, Ms. Gilliland admitted that she did not know whether the Department had made offers to the Tulsa employees to move to the Oklahoma City office or work out of their homes, and that the Tulsa office eventually closed. Ms. Gilliland also admitted to having no evidence to contradict the Department finance department if it says there are financial concerns at the Department, but insisted that the cuts were ultimately less than the Department said they would be because the Division is “hiring like crazy”.

Ms. Gilliland testified that Bobby Rumsfeld was also targeted by the Department. Mr.

Rumsfeld had planned to continue working for two years in order to qualify for Social Security payments. Ms. Gilliland stated that Department supervisors were very condescending to Mr. Rumsfeld; that supervisor Barry Montgomery was demeaning to him. Ms. Gilliland stated that at one point Mr. Montgomery's treatment of Mr. Rumsfeld made her go into her office and close her door because she was ashamed and couldn't stand to hear it.

Ms. Gilliland stated that Cheryl Williams was "an early one" and that Ms. Gilliland was targeted. She heard rumors that supervisors were giving Donny Watts problems, and Mr. Watts "took the buy-out". Ms. Gilliland believed that Ila Sutton was "being pushed out" and was being forced to take FMLA leave. Ms. Gilliland stated that the Department asked a lot of people to take FMLA leave who had not requested it.

Ms. Gilliland testified that this type of treatment of co-workers created "great stress in the workplace". She didn't like the treatment; didn't like "seeing people picked off". On cross-examination, Ms. Gilliland stated that she lost her composure at work one day and went into the lab in tears. She stated that Mr. Hudson came in and told her she was being insubordinate, and that he later explained that she had been insubordinate because "when I ask you a question, you have to answer me".

Ms. Gilliland testified that she was sick on March 13 and March 14 of 2013. On each day, Ms. Gilliland followed Department practice and called her supervisor, Jason Hudson, before 7:00 a.m. to report that she was sick and would not be at work. Ms. Gilliland testified that on March 15, 2013, she was still sick and again called Mr. Hudson before 7:00 a.m. to report that she would not be in. Ms. Gilliland testified that during the call, Mr. Hudson kept saying, "You're out of sick leave" and that she kept saying, "I don't understand because I have annual leave". Ms. Gilliland denied hanging up the phone on Mr. Hudson. Ms. Gilliland stated that after the

initial telephone call ended, Mr. Hudson called back and said, "It sounded like we got disconnected", and that Ms. Gilliland responded, "No, we were finished".

Ms. Gilliland testified that when Mr. Hudson called back on March 15, 2013, he had no new information. She stated that during the two March 15, 2013, calls, Mr. Hudson never told her she was being disrespectful. Ms. Gilliland stated that even though she was not raising her voice during the phone calls, Mr. Hudson would say, "You don't have to raise your voice to me". Ms. Gilliland testified that Mr. Hudson told her several times that she was being insubordinate, but did not tell her so during the phone calls of March 15, 2013.

Ms. Gilliland testified, partially on direct examination, and partially on cross-examination, that she was puzzled why Mr. Hudson had said she hung up the phone on him on March 15, 2013. Ms. Gilliland stated that she believed their conversation was over before she hung up. Ms. Gilliland testified that when she learned Mr. Hudson claimed she had hung up on him, she asked advice from friends about how to end telephone conversations with him, which she had found difficult because he sometimes just stayed on the line when the conversation was over. As a result of those discussions, she stated that she later implemented a practice of ending phone conversations with Mr. Hudson by saying, "Jason, we're approaching the end of our telephone conversation, and before we do, is there anything else you need to say to me". Mr. Hudson would reply that he had nothing else to say, and ask Ms. Gilliland if she had anything else to say. Ms. Gilliland would then say that she had nothing else to say and would tell Mr. Hudson, "I'll talk to you later; but if you continue to hold this phone, it will go dead".

Ms. Gilliland testified that following the two March 15, 2013, telephone calls, she directed her counsel to file a complaint against the Department with the Merit Protection Commission regarding a matter unrelated to the present appeal. Ms. Gilliland stated that after she

filed the MPC appeal, she was totally ignored at the Department "except for getting dumped on with this stuff". Ms. Gilliland testified that Ms. Jones never contacted her to get her side of her telephone conversations with Mr. Hudson and stated "it was like over night I was getting piled on". She testified that neither Mr. Hudson nor any other Department employee questioned her about her leave practices -- to get her side of the story -- before imposing the Disciplinary Action.

Ms. Gilliland stated that when Mr. Hudson was going over her evaluations with her, prior to the telephone calls of March 13, 14, and 15, 2013, he told her, "I see all the empty chairs around here and I know where the problem is". He then told her, "I see you have some comp time you need to get off the books". Ms. Gilliland testified that it was standard Department practice that the Department wanted employees to quickly use their comp time so that it wouldn't accrue on the books. On cross-examination, Ms. Gilliland testified that this conversation occurred during her PMP meetings with Mr. Hudson on two consecutive days, either March 10 and 11, 2013, or March 11 and 12, 2013.

On cross-examination, Ms. Gilliland stated that she broke her employment with the Department in 1999 over "the same thing". She stated that Jim Marshall said her treatment at the Department in 1999 was "because three females applied for the Directorship", and that he told her "of all the employees under the Reneau administration", Ms. Gilliland was "treated the worst". She stated that she was terminated from the Department in 1999.

Ms. Gilliland testified on cross-examination that the Department encouraged her to take FMLA leave when she didn't want it. She stated that when her father had health concerns, she was encouraged to take FMLA leave. She saw this as problematic because she believed it would allow the Department to have her exhaust her FMLA leave and then put pressure on her in a situation in which there is no leave left. Ms. Gilliland testified that Oleda Hix filled out

numerous FMLA packets for her that she did not request and that Ms. Gilliland did not have the forms completed by a doctor. Ms. Gilliland agreed with the Department counsel that if her supervisor, Ms. Jones, advised Ms. Hix that Ms. Gilliland was dealing with an FMLA event, it would be appropriate for Ms. Hix to prepare an FMLA packet. However, Ms. Gilliland stated that Ms. Hix would prepare the packets over “small stuff” like having a medical test done or having a respiratory infection.

With regard to FMLA packets, Ms. Gilliland testified that eventually Ms. Hix told Ms. Gilliland, “If I write another one of these and you don’t take it to your doctor, I’m going to write you up”. Ms. Gilliland and Ms. Hix discussed the matter with the Department Chief of Staff, Jim Marshall. Ms. Gilliland testified that Mr. Marshall said, “Oleda, when you say ‘write you up’ do you mean for insubordination?”, and Ms. Hix responded, “Yes”. Ms. Gilliland stated that that was the first time she heard Department supervisors use the term “insubordination” with regard to her conduct. Ms. Gilliland also testified that Mr. Marshall told her it was wrong for Ms. Hix to threaten to write her up.

On cross-examination, Ms. Gilliland acknowledged receipt of the Department employee handbook and knew that it required prior approval to take leave. But, Ms. Gilliland indicated she believed whether an employee must obtain prior approval to take leave in practice “depends on who they’re making the rules up for”. Ms. Gilliland also stated that she was required to turn in a repair bill when she took off to take care of her mother’s broken heater.

Ms. Gilliland testified on cross-examination that she did not believe it was improper for her to leave work on March 22, 2013, before obtaining approval from her supervisor. She believed this because no supervisor was there to approve her departure, and stated that she “thought nothing of it because it was work week adjustment and comp time”. Ms. Gilliland

stated that she did not believe the leave restrictions placed on her by the CAP contained in the Written Reprimand related in any way to comp time or work week adjustment, and stated, “Why would I risk something negative in my file over thirty minutes of comp time?”

FINDINGS OF FACT

The Department sent Notice of Proposed Disciplinary Action – Three (3) Workday’s Suspension without Pay ► Adjustment of Half (.50) Hour Comp Time to Ms. Gilliland on April 2, 2013 (the “Initial Notice”). The Initial Notice states three causes for the proposed discipline, as follows: (1) insubordination – failure to follow supervisor directive; (2) conduct unbecoming; and (3) leave abuse – violation of Department policy. The only specific acts or omissions and the only evidence to support the Department’s cause for discipline stated in the Initial Notice relate to Ms. Gilliland’s unauthorized use of one-half hour of comp time on March 22, 2013.

Ms. Gilliland was given an opportunity to respond to the Initial Notice, and in fact did respond through her counsel, Daniel J. Gamino. Ms. Gilliland’s response was considered by the Department in its decision to impose the Disciplinary Action.

On April 23, 2013, the Department issued its Notice of Final Action of Suspension without Pay (the “Final Notice”). The only Disciplinary Action taken against Ms. Gilliland in the Final Notice is a three day suspension without pay. The “Specifics of Cause” states in part, “Additionally, the (.50) hour of comp time taken on March 22, 2013 will be coded as unapproved leave without pay (LWOP) and the adjustment taken within the pay period of this final action.” However, the actual discipline imposed by the Final Notice does not include recoding the .5 hours of comp time as LWOP.

The Final Notice states the same three causes for the Disciplinary Action that are set forth in the Initial Notice, as follows: (1) insubordination – failure to follow supervisor directive; (2)

conduct unbecoming; and (3) leave abuse – violation of Department policy. As with the Initial Notice, the only specific acts or omissions and the only evidence to support the Department's cause for discipline stated in the Final Notice relate to Ms. Gilliland's unauthorized use of one-half hour of comp time on March 22, 2013.

Accordingly, Ms. Gilliland's only conduct that constitutes possible cause for the Disciplinary Action is her unauthorized use of one-half hour of comp time on March 22, 2013. If Ms. Gilliland took the half hour of compensatory time in violation of a valid, enforceable, and properly applied Department policy, her action may be cause for discipline.

Ms. Gilliland disputes that her early departure was improper on a number of grounds. She claims that she took all action she could to obtain permission. She emailed the appropriate supervisor, but claims that no supervisor was there to respond to her request. The claim falls flat. Evidence indicates that Ms. Gilliland could have contacted Ms. Jones by phone, but did not do so. In addition, Ms. Gilliland could have satisfied Department policy by seeking approval from either the Chief of Staff, Deputy Commissioner, or Commissioner of Labor, but did not request such approval.

Ms. Gilliland also attempts to justify her use of one-half hour of comp time without prior approval by claiming that it did not occur to her that comp time is leave. She considers leave to be only sick leave and annual leave. The point is a fair one. Even Counsel for the Department, in answering a question posed by the undersigned, stated that comp time is not leave. The undersigned agrees.

However, the Department employee handbook clearly states in the "Leaves of Absence" provision on page 20, that comp time must be approved in advance. The evidence presented in the case establishes that Ms. Gilliland acknowledged receipt of the employee handbook. Whether

or not comp time is classified as leave, then, is potentially irrelevant to a determination of whether Ms. Gilliland violated policy. Department policy as stated in the referenced section of the employee handbook, requires employees to obtain approval before taking comp time. Ms. Gilliland violated the policy. If the policy is valid and was properly implemented by the Department in the instant case, then discipline may be warranted.

The Department presented no evidence at all regarding the standard it uses to determine whether to approve requests for comp time. Although Department policy requires prior approval of comp time, the policy does not state the factors the Department will consider in approving or denying requests for comp time. No Department witness testified regarding the Department's practice of evaluating requests for comp time. The Department provided no testimony or exhibit to indicate that denying Ms. Gilliland's request for comp time was based on any particular factor, or that Ms. Jones made any determination of fact prior to denying Ms. Gilliland's request.

The Department provided almost one full day of testimony in an effort to establish that Ms. Gilliland had a history of insubordinate behavior and failure to follow supervisory directives. Ms. Gilliland provided almost another full day of testimony in an effort to prove the Department was on a mission to force employees in her age bracket into retirement, to show that she was a target of the mission, and to show that her work environment was hostile and she was treated unfairly. That testimony is summarized in approximately thirty pages of this Order. Much of the testimonial evidence, however, is not relevant to the limited issues presented.

Because the only facts and evidence stated in the Initial Notice and the Final Notice as the basis of the Disciplinary Action relate to Ms. Gilliland's unauthorized use of one-half hour of comp time, the bulk of testimony the Department presented on the subject of Ms. Gilliland's insubordination and refusal to follow supervisory instruction is irrelevant to support its action.

The only such evidence that bears directly on this appeal is testimony to establish that Ms. Gilliland's *unauthorized use of comp time was in itself insubordinate or somehow constituted conduct unbecoming*. The Department provided no such credible testimony.

Mr. Hudson's own explanation of the basis of his belief that Ms. Gilliland was generally insubordinate was confused and unclear, and as a result, was less than credible. Mr. Hudson testified that Ms. Gilliland was insubordinate during their first March 15, 2013 telephone call because she hung up on him, but also testified that he did not know whether she hung up on him or the line was disconnected. He stated that she was insubordinate during both calls on March 15, 2013 because her tone of voice was "not nice, not happy", but also testified that he knew she was sick. A "not nice, not happy" tone of voice may be neither nice nor happy, but the suggestion that it amounts to insubordination is without merit. Mr. Hudson also testified that Ms. Gilliland was insubordinate by withholding information – the fact that she already had a doctor's note -- from him during the calls. But Mr. Hudson provided no evidence that Ms. Gilliland had the note when he told her she would need to provide it, and admitted that he does not know whether she did. Mr. Hudson instructed Ms. Gilliland to provide a doctor's note. She did so. Had she refused to *provide* the doctor's note after his instruction to do so, insubordination might be a fair call, but such is not the case.

But even if Mr. Hudson's testimony clearly established that Ms. Gilliland was insubordinate during their March 15, 2013 telephone calls, which it did not, the matter would have no bearing on whether Ms. Gilliland was insubordinate in taking the half-hour of comp time without prior approval. Mr. Hudson did testify that he believed Ms. Gilliland was insubordinate in the manner in which she took the comp time without approval, because Ms. Gilliland's email to Ms. Jones *stated* that she was taking comp time rather than *asked* permission to take the time.

The distinction is hair-splitting at best. Ms. Gilliland's email to Ms. Jones was a clear communication of desire to take leave made prior to taking the leave. Nothing in the language of the email was insubordinate.

Ms. Jones testified that Ms. Gilliland had "consistent insubordinate behavior", but offered no specific examples of historic insubordination. Ms. Jones testified that Ms. Gilliland's behavior on her March 15, 2013 telephone calls with Mr. Hudson amounted to insubordination because the phone call was disconnected, because of Ms. Gilliland's tone of voice during the calls, because Ms. Gilliland withheld information that she had a doctor's note, and because Ms. Gilliland told Mr. Hudson that one of his questions was weird. Ms. Gilliland's behavior on the calls did not amount to insubordination for the same reasons stated above. Moreover, Ms. Jones was not a party to the telephone calls, and she is not qualified to testify regarding Ms. Gilliland's behavior on the calls. Even if Ms. Gilliland was insubordinate during her telephone calls with Mr. Hudson -- and the evidence does not indicate that she was -- her insubordination on those calls is irrelevant to her subsequent unauthorized use of comp time.

Ms. Jones also testified that Ms. Gilliland's unauthorized use of comp time was in itself insubordinate. This claim comes closer to the mark, but falls short. Ms. Jones testified that she had counseled Ms. Gilliland on several occasions regarding the appropriate use of leave. In addition, the Written Reprimand further restricted Ms. Gilliland's leave to sick leave with a doctor's note and FMLA leave. If Ms. Gilliland took the comp time, knowing that her comp time had been restricted by the Written Reprimand, the action might be insubordinate. But Ms. Gilliland testified that she never considered comp time to be leave and did not believe the Written Reprimand restricted her use of comp time. The Department introduced no evidence to establish that Ms. Gilliland's comp time was restricted by the Written Reprimand, and even the

Department's Counsel stated that comp time is not leave. Without evidence of some factor to make Ms. Gilliland's unauthorized use of thirty minutes of comp time something more than a simple failure to follow policy, her infraction is no more insubordinate than any employee's violation of any policy. Moreover, Ms. Gilliland testified that Mr. Hudson had previously advised her to use her comp time and that it was Department practice for employees to quickly use comp time so that it does not accumulate on the books. Under the circumstances, Ms. Gilliland's use of comp time without prior approval was not, in and of itself, insubordinate. In addition, Ms. Gilliland's unauthorized use of comp time would not be insubordinate unless the denial of her request to take comp time was valid in the first place.

The three day suspension without pay was purportedly based on insubordination, conduct unbecoming, and leave abuse. But, the Initial Notice and Final Notice state only the unauthorized use of comp time as the specific act leading to and evidence supporting the suspension. No fact, act, or omission is stated in either notice to support insubordination or conduct unbecoming.

Thus, if Appellee's discipline can stand, it must do so solely on the basis of Ms. Gilliland's unauthorized use of one-half hour of comp time on March 22, 2013. Because Ms. Gilliland clearly violated Department policy by taking the half-hour of comp time without prior approval, the issue becomes potentially two-fold: (1) whether the Department's denial of the comp time was proper in the first place; and if so (2) whether the discipline the Department imposed was just and appropriate under the circumstances

The Department provided no testimony or other evidence regarding the type of discipline it normally or sometimes imposes on employees who take thirty minutes of unauthorized comp time. In fact, Mr. Hudson's admission that he had never imposed a three day suspension without pay on an employee for taking thirty minutes of unauthorized leave was the Department's only

mention of the subject. The Department made no effort to establish that a three day suspension without pay of an employee -- or any suspension at all -- is just or appropriate discipline for taking a half-hour of unauthorized comp time. Nor did the Department offer any evidence that Ms. Gilliland's unauthorized use of thirty minutes of comp time on March 22, 2013 somehow impacted her job duties or responsibilities. Nor did the Department present evidence that allowing Ms. Gilliland to take the comp time on March 22, 2013 would have disrupted the Department operations or endanger public health, safety, or property.

Instead, the Department tried to present evidence that a three day suspension was just and appropriate under *these circumstances* because Ms. Gilliland was historically insubordinate and had attendance problems. But the Department never presented evidence that Ms. Gilliland abused leave policy. There was no evidence -- with the possible exception of the half hour of unauthorized comp time -- that Ms. Gilliland ever failed to show up for work without being excused by some type of leave.

Ironically, the Department's effort to establish Ms. Gilliland's general insubordination and history of non-compliance with supervisory directives hurts its ability to establish that the Discipline it imposed was just and appropriate under the circumstances. Insubordination is a term that, from the testimony presented, appears to be thrown around the Department fairly casually. Testimony established that various supervisors at the Department consider a broad range of human behavior to be insubordinate including an employee: not answering a question when asked; possibly hanging up a phone call or otherwise allowing the line to be disconnected; failing to advise a supervisor in advance that a directive to provide a doctor's note will be followed; using a tone that is "not nice, not happy"; being silent; making a request to a supervisor in the form of a statement rather than a question; telling a supervisor that his question is weird; taking

thirty minutes of comp time without approval; and refusing to complete FMLA forms for leave the employee did not request. The calls of insubordination by the Department's witnesses somehow fall flat. Used in this manner, insubordination becomes a general catch-all for supervisors to lord over employees.

Several circumstances mitigate the seriousness of the stated infraction and impact what, if any, discipline would be appropriate. Ms. Gilliland testified that she did not believe her use of comp time was restricted beyond normal policy by the Written Reprimand. Not only was this a reasonable conclusion, it was, in fact, the case. The Written Reprimand was silent as to comp time and restricted only "leave". Even the Department's Counsel stated that comp time is not "leave". Moreover, Department policy is somewhat unclear regarding obtaining prior approval for comp time, because the provision regarding comp time is stated under the heading "Leaves of Absence". Ms. Gilliland testified that Mr. Hudson advised her to take comp time as quickly as possible. Mr. Hudson did not deny it in his testimony, but stated only that he did not recall advising her on the matter. Ms. Gilliland also believed it to be Department procedure for employees to take comp time quickly so that it does not accumulate on the books. No testimony contradicted this belief. Ms. Gilliland was specifically instructed by Mr. Hudson to request leave during the week in question directly from Ms. Jones. No evidence indicated Ms. Jones advised her employees, as Mr. Hudson had done, that she would be away from the office and that leave requests should be directed to another supervisor.

Though both the Initial Notice and the Final Notice state that Ms. Gilliland willfully violated leave policy, no evidence suggests her misuse of comp time, if misuse it was, was willful. In fact, the only relevant testimony on the subject came from Ms. Gilliland's statements that it never occurred to her that comp time is leave and that the last thing she would do is risk a

negative action in her file to leave work thirty minutes early.

The Department *suspended* Ms. Gilliland for three days because she used thirty-minutes of comp time without prior approval. That is the sole cause of the suspension as stated in the Notices. But the Department *punished* Ms. Gilliland because her supervisors find her problematic and insubordinate. The half-hour of unauthorized comp time may have been the final straw, but if the Department wanted to punish Ms. Gilliland for breaking the camel's back, it was obliged by law to notify her of each straw she allegedly piled on. In addition, if the Department wanted to discipline Ms. Gilliland for violating Department policy regarding use of comp time, it was obliged to implement the policy in a manner consistent with the law. This it did not do.

CONCLUSIONS OF LAW

1. Any finding of fact that is properly a conclusion of law is hereby incorporated as a conclusion of law.
2. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause.
3. Under the Merit Rules, the burden of proof in this matter was on Appellee to show by a preponderance of the evidence that just cause existed for the adverse action and the discipline imposed was just. OAC 455:10-9-2.
4. Upon a finding that just cause existed for adverse action but did not justify the severity of the discipline imposed, the presiding official must consider the following: 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 mitigating circumstances.

OAC 455:10-9-2(f)(1)(C).

5. An agency may discharge, suspend without pay for period not to exceed 60 days, or demote a permanent, classified employee for, among other things, misconduct, insubordination, inefficiency, inability to perform the duties of the position, willful violation of the Oklahoma Personnel Act or the Merit Rules, conduct unbecoming a public employee or any other just cause. OAC 455:10-11-14.

6. The Personnel Act and Merit Rules do not require a hearing prior to a suspension without pay. Nor is an appointing authority prohibited from seeing information unrelated to the grounds for the discipline. The 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.

7. The Merit Rules require an appointing authority to approve an employee's request to take compensatory time off on a particular day, unless the employee's taking compensatory time off on that day disrupts agency operations or endangers public health, safety, or property. OAC 530:10-7-12.

8. Appellee has failed to meet its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Appellant for "leave abuse – violation of ODOL policy" as set forth in the Notice of Final Action of Suspension without Pay, because Appellee offered no evidence that denying Ms. Gilliland's request for thirty minutes of comp time on March 22, 2013 would disrupt Department operations or endanger public health, safety, or property. Appellee has not met its burden to prove, by a preponderance of the evidence, that just

cause exists to discipline Appellant for “insubordination – failure to follow supervisor directive” or “conduct unbecoming” as set forth in the Notice of Final Action of Suspension without Pay.

9. Because Appellee has failed to meet its burden of proof that just cause exists to impose any discipline on Appellant, no conclusion of law is necessary with regard to the justice of the the discipline imposed under the circumstances.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Appellant’s appeal be **SUSTAINED**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the discipline imposed upon Appellant is rescinded.

IT IS FURTHER ORDERED, ADUDGED AND DECREED that Appellee shall reinstate and pay all salary and benefits lost to Appellant by imposition of the three day suspension without pay; Appellant’s personnel records are to be expunged of all references to this disciplinary action.

Dated this 11th day of October, 2013.



Matt Hopkins
Administrative Law Judge
Oklahoma Merit Protection Commission
3545 N.W. 58th Street
Oklahoma City, OK 73112