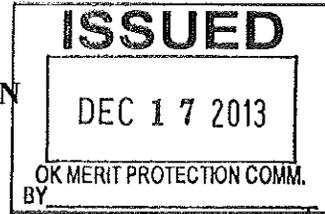


BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA



WILLIAM E. BROILES,)
Appellant,)
v.)
OKLAHOMA DEPARTMENT)
OF CORRECTIONS,)
Appellee.)

Case No. MPC 13-186

FINAL ORDER

This matter comes on for hearing on December 4, 2013 before the duly appointed, undersigned Administrative Law Judge (hereinafter "ALJ") at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, William E. Broiles, (hereinafter "Broiles"), appears personally and through counsel, Barrett Bowers. The Appellee, Oklahoma Department of Corrections (hereinafter "DOC"), appears by and through counsel, Michele Minietta. Also present for Appellee was Table Representative, Joyce Jackson.

Appellant Broiles is a permanent, classified employee of DOC, appealing an adverse disciplinary action of a three day suspension without pay. During the administrative hearing, the sworn testimony of witnesses was presented, along with exhibits. Joint Exhibits 1 through 32 were offered jointly and were admitted. The Appellee offered Appellee's Exhibit 1, which was admitted with no objection. The Appellant offered Appellant's Rebuttal Exhibit 1, which was objected to by the Appellee and which was denied admission because improper notice was given to the Appellee. Accordingly, the exhibits presented and admitted are made a part of the record herein.

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

FINDINGS OF FACT

Background of Case

Broiles has been employed by DOC as a Photographer since 1994. The parties stipulated that the Merit Protection Commission (hereinafter "MPC") has jurisdiction of this matter, that Broiles is a permanent, classified employee of DOC, that Broiles timely filed his appeal and that Broiles was suspended without pay for three days from April 30 to May 2, 2013.

In the summer of 2012, Broiles was driving a state vehicle with several DOC employees as passengers. During the trip, Joyce Jackson, Broiles' supervisor, became alarmed and reached for the steering wheel, which greatly upset Broiles. The next few times that Jackson had Broiles drive, he refused to have Jackson in the front seat, expressing his concern for her grabbing at the steering wheel while he was driving. This behavior resulted in a written reprimand for insubordination resulting from Broiles' verbal attacks on Jackson. The relationship between employee and supervisor seemed to sour after these events. This disciplinary action is based upon the events of March 13 to 20, 2013. On March 28, 2013, DOC provided Broiles with notice of the proposed disciplinary action of suspension without pay (Joint Exhibit 2). The notice alleged that Broiles conduct "seems to be reflecting a continuous pattern of insubordination, staff disruption, problem following orders and management of time concerning assigned tasks". The Notice failed to contain an acknowledgment of delivery to Broiles as required by the DOC Policy. On April 5, 2013, Broiles provided a written response to the proposed discipline (Joint Exhibit 3) and acknowledged that he received the Notice on March 29, 2013. In a letter dated April 19, 2013, DOC provided Broiles with written notice of discipline, imposing a three day suspension without pay (Joint Exhibit 4). Broiles timely appealed the disciplinary action. In his appeal filed on May 13, 2013, Broiles stated that he was personally served with the Notice on April 24, 2013.

ISSUES

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

The Testimony

The testimony of three (3) witnesses was given in this administrative hearing, with each witness sworn and offered under oath.

Marcella Reed is an Administrative Specialist at DOC. Reed worked with Broiles and acted as his supervisor for a period of time. Jackson is also her supervisor. She indicated that generally there was a good working relationship. She described the duties of the office, involving the media contacts, newsletters and publicity information. Reed stated that after Broiles completes the photography assignments, he delivers the CDs to her for review and then she passes them on to Jackson. She testified that she was in the car with Jackson and Broiles in July, 2012. She stated that they were driving north on I-35 in traffic but she was distracted and did not see Jackson grab for the steering wheel. She was also present later when Broiles and Jackson got into a heated argument about Jackson not being in the front seat when Broiles was driving. Reed also testified that she heard Broiles and Jackson arguing in Jackson's office on several occasions. She had no testimony regarding the incidents involved in this disciplinary action.

Joyce Jackson is the Executive Communications Administrator for DOC. She denied ever grabbing the steering wheel while Broiles was driving. She stated that she reached for it out of instinct because she thought Broiles was distracted but that she never touched it. She imposed previous discipline in the form of a letter of reprimand on Broiles for his conduct after this event. Jackson stated that she and Broiles had several discussions and email exchanges about his pending assignments in early March, 2013. She admitted that there was generally a two week time frame for getting assignments to her but no specific deadlines had been previously imposed. She was getting inquiries about several of the projects and was urging Broiles to complete them. Finally, she stated that they met on March 13, 2013 and she told Broiles that certain assignments must be finished by the end of that week and that Broiles' leave scheduled for March 15 was denied. Jackson stated that she directed Broiles to call her after 4:00 pm on March 14 to update her on his progress. She said that she never received a call from him and that she was off on March 15. Jackson also said she learned that Broiles called in sick for March 15. Jackson said she tried to call Broiles in the morning on March 19, but couldn't reach him. Jackson admitted that she never left a message on his office or cell phone and did not email or text him. She then left the office for a meeting and told another employee to tell Broiles that she needed to talk to him. Later she received a text message from him. They spoke on the phone and Jackson told him that she was denying his request for leave on March 22. On March 20, they again spoke on

the phone and Broiles stated that she couldn't deny his leave. Jackson acknowledged hanging up on Broiles. Broiles later came to her office to give her an update on the assignments but they argued and Jackson told Broiles to "do what you think is best". Broiles reported to work as scheduled on March 22 and completed the assignments over the next few days. Jackson also acknowledged that she didn't have documentation of receipt of either the Notice or the Final Action, both as required by DOC policy OP-110415 (Joint Exhibit 13). Jackson also stated that she did not consider any alternatives to the suspension without pay. Jackson's testimony concerning the method of delivery of the Notices and Final Action was conflicting. She originally stated that she gave the letter to Broiles that day, then stated in her deposition that she put it in an envelope and left it in his box, then corrected herself again and testified that she gave it to him the next day. Jackson also stated that she is not familiar with the process that Broiles uses to adjust the photographs. She also could not remember the specific date that she told Broiles that the photos were due. She stated that she knew that Broiles had misunderstood her request on March 14, but she didn't consider that because she knew what she wanted. Jackson also said that staff confirmed that Broiles came to her office at 4:00 on March 14 expecting a meeting. Jackson also admitted that Broiles is the only employee that she forces to sign in and out to get a key to his office.

The Appellant made an oral Motion for a Directed Verdict, stating that DOC had failed to meet its burden of proof, that DOC had failed to follow its own policies and that there was no evidence that Broiles intentionally failed to complete his assigned projects. DOC argues that any such failure on its part to follow policy was "harmless error" in that Broiles did ultimately receive the notices and was not harmed by the lack of proof of notice. The Motion was denied.

Broiles, the Appellant testified last. He stated that he had been the staff photographer at DOC since 1994. He stated that he worked 30 hours a week. He said that DOC also employs other photographers but he is responsible for editing all DOC photos. Broiles stated that he edits the raw files rather than jpeg files and that takes almost twice as long but produces a higher quality product. Broiles said he has tried to demonstrate this process to Jackson, but she refused. Broiles stated that he routinely turns in leave requests weeks or months in advance, but Jackson holds the requests until the last minute to approve. Broiles stated that on March 13, Jackson said the Board meeting photos were the top priority and he spent all day on March 14 working on the assignment. He also stated that Jackson directed him to come to her office at 4:00 to discuss. He

went and she was not there. Later that evening, he called and left word that he had become ill and would not be in on March 15. Broiles stated that on March 19, after he got to work, he went to the payroll office to resolve an issue. He also completed the Board photo assignment. He stated that on March 20, Jackson began yelling at him and told him "he made her act that way". Broiles said this action was based upon a series of misunderstandings, not insubordination or a power struggle. He denied being disrespectful but that Jackson refused to treat him appropriately. He said that Jackson's deadlines were unrealistic given the amount of work that needed to be done. He said that he tried to communicate a realistic timeframe and that he takes a great deal of pride in his work.

DISCUSSION

DOC defines insubordination as "any failure to carry out the lawful orders or directives of supervisors/managers, or any conduct towards a supervisor/manager which disregards or is disrespectful of the authority or office of the supervisor/manager" (Joint Exhibit 1). On March 12, Jackson emailed Broiles and requested that he complete certain projects "as soon as possible" and Broiles responded with the estimated completion dates on those projects (Joint Exhibit 8). On March 20, Jackson again emailed Broiles with definite deadlines for the pending assignments and Broiles responded with his progress, including different completion dates (Joint Exhibit 12). Apparently, this was the first time that definite deadlines had ever been imposed. Broiles responded to it as if it were a request for a status report rather than a direct order. This matter doesn't seem to be "a continuous pattern of insubordination", but more of a continuous pattern of miscommunication between employee and supervisor. In any event, Broiles did not take leave on March 22, but reported to work in an effort to complete the assignments. There was no evidence that Broiles was wasting time or that he was intentionally delaying these projects. While Broiles may have failed to complete some of the assignments by the deadlines, the majority were completed. Even though, Broiles' actions seem to meet DOC's definition of insubordination which includes "any failure", there is insufficient evidence of "a continuous pattern of insubordination, staff disruption, problem following orders and management of time concerning assigned tasks".

It also appears that Jackson failed to follow DOC policy (Joint Exhibit 13) in several critical ways. First, she failed to document the date of receipt by Broiles of either the Notice or the Final Action. Jackson was aware of this requirement as she included it on two previous letters of reprimand furnished to Broiles (Joint Exhibit 14 and Appellee's Exhibit 1). The Policy, at pages 8 and 9, specifically states that the written notice of suspension without pay "must include" documentation of date of receipt by employee. Next, notice of the final action must be provided to the employee within ten working days of receipt of the employee's response. Broiles response was dated April 5, 2013 and receipt on that date was acknowledged in the Final Action. The Final Action is dated April 19, but Broiles doesn't acknowledge receipt until April 24 via personal service. As Jackson failed to include proof of receipt, the admitted date of April 24 must be used. This is 13 business days after receipt of the response from the employee.

The goal of progressive discipline is to redirect classified employees toward improved performance and conduct. The evidence supports that this seems to be as much miscommunication as it is insubordination. Yes, Broiles should have provided a more respectful, response instead of simply substituting his own deadlines. However, it is reasonable to consider as mitigation that this seems to be the first time specific deadlines had ever been imposed. The undersigned has considered all of the facts and circumstances of this case and the testimony of the witnesses. DOC has met its burden that a violation of policy has occurred however, its failure to follow the mandates of DOC policy regarding the imposition of final notices and the policy regarding progressive discipline requires that a lesser form of discipline be imposed. Mitigation warrants a more just and appropriate discipline. Given the totality of the circumstances, a reduction of the discipline to a written reprimand is appropriate. In addition, it is strongly recommended that DOC utilize training or other tools to improve the lines of communication between this supervisor and employee in an effort to redirect his performance and conduct, consistent with the principals of progressive discipline.

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.

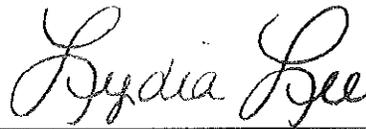
2. Any finding of fact which is properly a conclusion of law is so incorporated herein as a conclusion of law.
3. Title 74 O.S. §840-6.5 and OAC 455:10-9-2 states that the Appellee DOC has the burden of proof in an adverse action and must prove by a preponderance of the evidence that just cause exists for the adverse action and that the discipline imposed is just.
4. OAC 455:10-11-11 indicates that a written reprimand may be imposed to correct violations of policy, statute or rule.
5. The preponderance of the evidence shows that Broiles' conduct in failing to complete all of his assigned projects by the deadline imposed by his supervisor meets the broad DOC definition of insubordination.
6. Appellee DOC has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Broiles for his failure to complete assignments by the deadline imposed by his supervisor and his appeal on that ground is denied.
7. Appellee DOC has failed to meet its burden to prove, by a preponderance of the evidence, that the discipline of a three day suspension without pay was just and appropriate under the circumstances and consistent with progressive discipline. DOC's violations of policy and the mitigating circumstances discussed herein support the conclusion that 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 Broiles' duties and responsibilities; the consistency of action taken by DOC with respect to similar conduct by other employees; the previous employment and disciplinary records of Broiles; and other mitigating circumstances as discussed herein.
9. The record herein supports imposition of formal discipline in the form of a written reprimand as just and appropriate considering all of the facts and circumstances.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant William E. Broiles, MPC 13-186 be

DENIED IN PART and SUSTAINED IN PART. The discipline imposed upon Appellant is reduced to a written Letter of Reprimand consistent with this Order. Appellant is to receive back pay and benefits for the three day period from April 30 to May 2, 2013 and Appellant's personnel records are to be expunged consistent with this Order.

This Order entered this 16th day of December, 2013.

A handwritten signature in cursive script that reads "Lydia Lee". The signature is written in black ink and is positioned above a horizontal line.

Lydia Lee
Administrative Law Judge