

BEFORE THE MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

SHARON WARRIOR,

Appellant,

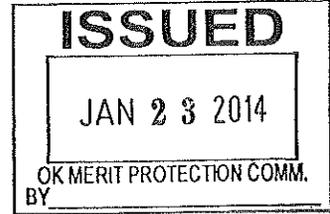
v.

DEPARTMENT OF CORRECTIONS,

Appellee.

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MPC 14-048



FINAL ORDER

This matter came on for hearing on January 9, 2014, before the undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, 3545 NW 58th Street, Suite 360, Oklahoma City, Oklahoma. The Appellant, Sharon Warrior, appeared personally, *pro se*. The Appellee appeared through its counsel, Michele J. Minietta and through party representative, Sharon McCoy.

Appellant is a permanent, classified employee of Appellee, appealing from an adverse disciplinary action of a five day suspension without pay. The discipline was imposed on Appellant for three acts or omissions: (1) failure to leave someone acting in her absence after being directed by Warden McCoy to do so; (2) failure to complete required in-service training by June 30, 2013, as directed by Warden McCoy and (3) failure to provide the 2012 yearly Programs Report by May 13, 2013, as directed by Warden McCoy.

The record was opened and the hearing began. The undersigned heard the sworn testimony of witnesses, viewed the exhibits admitted into evidence, and heard arguments from counsel. The sworn testimony of five witnesses was presented, and exhibits were

introduced. The undersigned admitted into evidence Joint Exhibits 1-20 and portions of Appellant's Exhibit 3.¹ The parties were given the opportunity to present their closing arguments, whereupon the record was closed.

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 pursuant to 74 O.S. § 840-6.7(B).

FINDINGS OF FACT

Background of Case

Appellant serves as a Case Manager Coordinator² at the Eddie Warrior Correctional Center ("EWCC"). On July 31, 2013, Appellant was notified of a proposed suspension without pay. The letter stated that Appellant had violated OP-110215 with respect to the three items previously listed. Appellant responded to this letter on August 7, 2013. Appellee issued a suspension without pay letter on August 16, 2013, stating that the actions previously identified constituted insubordination and therefore were subject to a suspension without pay.

The Testimony

The testimony of five witnesses, properly sworn and under oath, was taken and was made a part of the record.

A. Deputy Warden Gregory Breslin. Gregory Breslin was the Deputy Warden at EWCC during the period in question. He was Appellant's immediate

¹ Appellant's Exhibit 3 related to a number of errant discharges. Warden McCoy testified that one of the things she considered in imposing discipline was the errant discharge of Pamela Dewitt. Only the portion of Appellant's Exhibit 3 relating to Dewitt was admitted.

² The position was also referred to a Case Manager Supervisor and a Correctional Case Manager IV in the evidence presented. The correct nomenclature is not an issue in this matter, therefore Case Manager Coordinator will be used throughout this Order.

supervisor. Breslin had previously served as a Case Manager Coordinator, the job held by Appellant, and was familiar with its responsibilities. The Case Manager Coordinator (“CMC”) is responsible for quality assurance over inmate packets turned in by case managers. The CMC supervises the record managers who keep copies of the offenders’ records, tally time served, post credits and time increases and other record-keeping functions relating to the offenders. The CMC is also responsible for ensuring that paroles, discharges and offender movements are handled properly. The CMC is a unique position at the facility performed by no one other than Appellant.

Breslin testified at length about the need for employees of EWCC to leave someone acting in their stead when they were absent from the facility. Breslin explained that the facility operates with a strong chain of command and understanding of responsibilities. He stated that it was crucial to the operation of the facility for employees to know whom to contact when an issue arises. He described the lack of a designated acting employee as potentially catastrophic.

With respect to Appellant, Breslin noted that Appellant had been specifically warned in a meeting held May 23, 2013, that she must not be absent from the facility without designating an Acting CMC. The issue was also addressed with her in a written PMP dated June 5, 2013.

Breslin stated that he had told Appellant that if she was unable to find someone to act as Acting CMC, to come to him and he would appoint someone or direct her to someone to contact. He admitted that he had directed Appellant not to leave Records Managers, whom she supervises, acting in her place. However, he believes Case Managers are capable of acting for Appellant, have the time to do so, and need to learn

about the job. He noted that Appellant had been a Case Manager prior to becoming the CMC.

With respect to the dates of absence referenced in the letter of suspension without pay, Breslin admitted that nothing catastrophic happened in the absence of Appellant. With respect to the other issues raised in the letter of suspension, Breslin stated that Appellant had never requested help from him with completing in-service training or completing program documents.

B. Christy Hendrex. Hendrex is a training officer who is tasked with ensuring that EWCC employees complete their annual in-service training requirements. She is not an employee of EWCC. She is responsible for setting up training and subsequently entering training information for approximately 115 to 120 employees. Certain training classes are required each year. Some training can be done as computerized CD training, while others must be completed in classroom.

Hendrex' PMP states that training for the employees under her responsibility should be completed by October 1 of each year in order to allow time to enter all of the data and prepare the necessary reports. In early 2013,³ Warden McCoy informed EWCC employees that 2013 in-service training should be completed by June 1, 2013.

On June 12, 2013, a memo was sent to EWCC department heads by Warden McCoy. The memo indicated that five employees had not yet met in-service training requirements. One employee lacked all training, but had been out all year on medical leave. Three employees lacked one class each. Appellant lacked five classes.

³ The June 17, 2013, memo from Warden McCoy to Appellant states that the Warden has been telling department heads for four months of her expectations of completing in-service training by June 1, 2013.

Hendrex testified that the classes Appellant had not yet taken were offered from eight to fifteen times per year, depending on the class. Appellant ultimately completed her training by the end of the year, including some one-on-one training with Hendrex. Hendrex stated that she believed training was an important aspect of an employee's job. Hendrex also testified she had no issues with Appellant's training records.

C. Denise Gaulden. Gaulden is the Procedures Officer at EWCC. Gaulden is responsible for the accreditation audits by the American Correctional Association ("ACA"), as well as internal audits conducted in between ACA audits. She is also responsible for EWCC's policies and procedures. She testified that EWCC underwent an ACA audit in 2012. ACA has approximately 528 standards, 62 of which are mandatory. EWCC must receive a 100% on each mandatory standard to be accredited. Accreditation requires a score of 90% on the remaining standards. EWCC achieved 100% on all standards in the 2012 ACA audit.

In 2013, EWCC underwent an internal audit in order to make sure it was still meeting ACA standards. Each of the ACA standards has a file for documentation demonstrating compliance with the standard. Beginning with the 2013 internal audit, EWCC switched to electronic files for the ACA standards. On April 16, 2013, Warden McCoy issued a memorandum to department heads regarding training on the new electronic file system. The memorandum also stated that first quarter documentation was due to the Procedures office no later than May 10, 2013.

Gaulden testified that two of the files for which Appellant was responsible did not contain the required documentation when the auditors performed the audit. She stated the standards at issue concerned the Annual Programs Report. She admitted that the Annual

Programs Report for 2013 would not be completed until the end of the year. She stated, however, that a memo should have been included stating that the Annual Programs Report would be completed at the end of the year. She did not discuss with Appellant putting a memo in lieu of the report prior to the issue arising during the audit. She subsequently obtained information from Appellant and was able to get the auditors to audit the two files. They determined the standards were met.

D. Warden Sharon McCoy. Warden McCoy is the warden of EWCC. She directly supervises the Deputy Warden, who supervises Appellant, putting her directly in Appellant's chain of command. She testified Appellant is a very capable employee, but there is a communication issue. She also stated Appellant wants to do things her own way, not the way she is directed.

With respect to the issues raised in the discipline, Warden McCoy stated she directly addressed with Appellant the concerns about her not leaving an Acting CMC. Even though she is not Appellant's direct supervisor, she testified it was such an important issue that she felt she needed to raise it with Appellant personally.

Warden McCoy wrote a memorandum to Appellant on June 17, 2013, about her failure to complete in-service training by June 1, 2013. She gave Appellant until the end of June to complete training. Warden McCoy testified that she believes this failure by Appellant was a sign of Appellant being uncooperative. She noted that Appellant found time to teach an outside class. She did admit, however, that she was not certain when those classes were actually taught and that she was not aware of any occurring before June 1, 2013. She also admitted that due to staffing issues, Appellant was performing most of the job duties of five other job classifications in addition to her own. Still,

Warden McCoy states Appellant was told several times to do something and did not get it done and was therefore insubordinate.

Warden McCoy also testified about the importance of the internal audit and the failure of Appellant to submit the required documentation. She stated the purpose of the internal audit was to ensure the safety and security of the facility by making sure best practices were being followed. ACA accreditation is mandatory, not optional. She did, however, also admit she was not aware of what should have been put in the file.

Warden McCoy stated Appellant had violated OP-110215. Specifically, Warden McCoy testified Appellant had failed to fully devote full time, attention and effort to her duties during assigned hours of duties by not leaving an acting CMC and not meeting deadlines. She also stated Appellant was insubordinate because she had failed to carry out the directives of Warden McCoy with respect to all three issues raised in the discipline.

In determining the appropriate discipline, Warden McCoy testified about the matters she considered.⁴ She considered prior discipline imposed within the preceding four years. Specifically, Warden McCoy testified she considered an August 8, 2012, Letter of Reprimand from a previous warden for Appellant's failure to turn in daily issue keys and a June 7, 2013, Letter of Reprimand from Deputy Warden Breslin regarding errant discharge issues with respect to several offenders.⁵

Warden McCoy also stated that suspension without pay was warranted because it was the next level after written reprimand, that Appellant had already received written

⁴ Warden McCoy also testified about issues with Appellant that occurred after the suspension. Although the *pro se* Appellant did not object to this testimony, it clearly could not have formed part of the consideration for the decision to impose the discipline at issue. For this reason, it was not considered.

⁵ Warden McCoy initially referenced offender Pamela Dewitt as an errant discharge she considered because of prior discipline. The portion of Appellant's Exhibit 3 relating to Dewitt was admitted. However, the Letter of Reprimand relating to errant discharge does not mention Dewitt. Furthermore, upon questioning by Appellant, Warden McCoy was unable to testify that Dewitt was, in fact, an errant discharge.

reprimands for insubordination and that taking it the next step would help change Appellant. She therefore ruled out a third letter of reprimand. She testified she believed the discipline imposed was warranted. However, neither of the introduced Letters of Reprimand referenced insubordination.

E. Sharon Warrior. Appellant testified that her department has not been fully staffed in 7½ years. She stated she was performing most of the duties for six employees. This is consistent with Warden McCoy's testimony.

With respect to the issue of failure to complete in-service training, Appellant testified that some of the classes are full day and not offered all the time. She also testified that one of the training classes she had not completed by June 1, 2013, was a class she actually teaches. In short, Appellant stated that she was trying to manage the responsibilities of all of the positions she was filling and her training and that the directive issued at the beginning of the year to complete in-service training by June 1, 2013, ended up in conflict with other directives more directly related to the performance of her job duties. She notes that the follow-up directive to finish her training by June 30, 2013, was not issued until June 17, 2013.

Regarding the internal audit, Appellant agreed the directive from Warden McCoy stated the first quarter documentation was due to the Procedures office no later than May 10, 2013. However, Appellant stated the Annual Program Report is compiled annually and is not part of the first quarter documentation. She further testified that the 2012 report, which was the subject of the discipline, had been provided in the 2012 ACA audit and the 2013 report would not be completed until the end of the year. She stated she was not told to prepare a memorandum stating the 2013 Annual Programs Report would not

be completed until the end of 2013 until after the lack of documentation was raised by the auditor. She was also not told to resubmit the 2012 report which had already been considered by the 2012 ACA audit.

As for the issue of failing to designate an Acting CMC on June 11 and 12, 2013, Appellant admitted she did not leave anyone acting in her absence, nor did she make much effort to do so. She claimed that she was so busy on June 10, 2013, that she simply did not have a chance to find someone. She therefore made herself available by phone and email. She did not dispute that the issue had been raised with her before and that she had clearly been told to appoint an Acting CMC. She also did not dispute she did not approach either the Warden or Deputy Warden for help in securing an Acting CMC.

Discussion

Because this is an adverse action appeal, Appellee has the burden of proving there is just cause to impose discipline and that the discipline imposed was appropriate. Here, Appellee imposed a five day suspension without pay. The discipline was imposed on Appellant for three acts or omissions: (1) failure to leave someone acting in her absence after being directed by Warden McCoy to do so; (2) failure to complete required in-service training by June 30, 2013, as directed by Warden McCoy and (3) failure to provide the 2012 yearly Programs Report by May 13, 2013, as directed by Warden McCoy.

Merit Rules allow for a suspension without pay for a limited number of infractions, including insubordination. Appellee characterized the failures identified above as cases of insubordination to support the imposition of the discipline. In addition,

Appellee considered previous written reprimands. However, neither of the considered reprimands referenced insubordination as an issue.

1. Failure to provide the 2012 Annual Programs Report by May 13, 2013

The directive issued with respect to this matter by Warden McCoy stated that the 1st quarter documentation was due to the procedures office no later than May 10, 2013. Appellant testified the Annual Programs Report was not part of "1st quarter documentation." Moreover, Appellant testified the 2012 Annual Programs Report referenced in the discipline was, in fact, provided as part of the previous year's ACA audit. She further testified the 2013 report would not be completed until the end of the year.

None of the witnesses from the agency contradicted any of these statements. Instead, Gaulden testified that a memo stating the report would not be completed until the end of the year should have been placed in the relevant folders. However, it appeared this was a suggestion she received from the auditors after the issue arose. Ultimately this occurred and the auditors determined the standards were met.

The agency has failed to meet its burden of proof to establish that Appellant was insubordinate with respect to the failure to submit required documentation for the internal audit. In fact, the agency failed to establish it had just cause to discipline Appellant with respect to this issue. A suspension without pay premised on this violation cannot be sustained.

2. Failure to complete required in-service training by June 30, 2013

There is no dispute that at some point in early 2013, Warden McCoy announced that in-service training should be completed by June 1, 2013. This was an abbreviated time frame compared to previous years.

Appellant testified that she is performing many of the functions of numerous different jobs at EWCC due to understaffing. Warden McCoy agreed that this was true. It is clear that Appellant had not completed all of her training by June 1, 2013. On June 12, 2013, Warden McCoy sent a memo asking for an explanation for failure to complete training. Appellant responded on June 14, 2013, that her various and frequently changing job assignments had conflicted with the scheduled training sessions. On June 17, 2013, the Warden responded that Appellant had until June 30, 2013, to finish the assignments. There was no evidence offered to show what, if any, training opportunities were available those two weeks.

Although Warden McCoy admitted that Appellant was performing more job assignments than her actual job classification, she stated that Appellant had found time to teach a class outside of the facility. However, the evidence established those classes were all taught after the deadline. Moreover, while Hendrex testified about how often various training classes were offered throughout the year, she did not establish how many opportunities occurred during the approximately four months between the Warden announcing the early deadline for training completion and the June 1, 2013, deadline.

Warden McCoy stated that Appellant's failure to complete training by June 1, 2013, was Appellant being uncooperative and insubordinate. However, Appellant provided significant evidence of competing interests on her time. Appellee agreed that Appellant was performing, and performing well, the jobs of as many as six employees.

However, it is clear that Appellant attempted to self-prioritize her various responsibilities in a way that did not comport with the priorities of Warden McCoy. Appellant was given the opportunity to request help, yet chose to decline it. In doing so, her time problem became one at least partially of her making. Appellant viewed her in-service training as less important than other aspects of the work she was performing.

Accordingly, it is clear that Appellant failed to complete her training on the schedule set forth by Warden McCoy. This failure is significant enough to allow for the imposition of discipline, such as a reprimand. However, in order to support a suspension without pay, the failure must rise to the level of insubordination. While Appellee proved by a preponderance of the evidence that just cause existed for discipline of Appellant, it failed to prove by a preponderance of the evidence that Appellant was insubordinate with respect to this issue. A suspension without pay premised on this violation cannot be sustained.

3. Failure to leave someone acting in her absence after being directed by Warden McCoy to do so

The agency established that leaving an Acting CMC is a crucial part of the operation of the EWCC. Breslin's testimony of the potential for catastrophe was credible.⁶ Both Breslin and Warden McCoy identified the reasons for this policy. Appellant clearly understood the policy and was aware of its requirements. Moreover, Appellant was told at the May 22, 2013, staff meeting to always appoint an Acting CMC if she was going to be absent. This directive was given by Warden McCoy directly to Appellant.

⁶ While Breslin admitted that nothing catastrophic had actually occurred on the two days in question, that fact does not detract from the evidence that the policy is aimed at limiting the potential for disaster.

Breslin stated that he had told Appellant that case managers were suitable to act in her stead. He further stated that he had told Appellant to come to him for help if she was unable to find someone. Appellant questioned whether case managers were capable of serving as Acting CMC, but that decision is not one for her to make. She did not dispute that Breslin had told her they were.

With respect to the dates at issue here, Appellant admits she was busy the day before and did not find anyone to serve as Acting CMC. She did not seek help from Breslin or Warden McCoy in appointing someone, choosing instead to be available by phone or email. This directly contradicts the clear directive she was given three weeks earlier to not be absent from the facility without having appointed an Acting CMC.

Appellee met its burden of proof that Appellant failed to carry out the lawful order or directive of a supervisor. This is not an issue of competing priorities, but of failing to comply with a specific and direct command. Appellee likewise demonstrated the importance of the specific directive. Given her long tenure at EWCC, Appellant should be aware of the need to preserve a chain of command. She was clearly aware of the directive and was counseled by the Warden against future absences without appointing an Acting CMC. Yet, on June 11 and 12, 2013, she was absent from the facility without an Acting CMC having been appointed in her place.

Appellee established insubordination by a preponderance of the evidence with respect to this issue. Therefore, just cause exists for discipline of Appellant and that discipline may include suspension without pay. However, Appellee imposed a five day suspension without pay based on three acts of insubordination, only one of which has been sustained.

In determining whether the severity of discipline is appropriate, the ALJ must consider 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;⁷ the previous employment and disciplinary records of the employee; and mitigating circumstances. Taking those factors into account, they do not justify the severity of discipline imposed and a reduction in the discipline is appropriate. The undersigned finds that a suspension without pay for three (3) days is appropriate.

CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this case.

2. Any finding of fact that is properly a conclusion of law is hereby incorporated as a conclusion of law.

3. Under the Merit Rules, the burden of proof in this matter was on the Appellee to show by a preponderance of the evidence that just cause existed for the adverse action and the discipline imposed was appropriate. 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. Appellee is required to establish a written progressive discipline policy designed to ensure consistency, impartiality and predictability with penalties ranging

⁷ No evidence relating to discipline of other employees was introduced.

from informal discipline to formal discipline, up to discharge. 74 O.S. § 840-6.3; OAC 455:10-11-4 – 455:10-11-11.

6. Absent mitigating circumstances, repetition of an offense generally is accompanied by progression to the next higher level of discipline, but, dependent on the circumstances, a single incident may justify proceeding to a higher step before going through the lower steps. OAC 455:10-11-4.

7. Appellee may discharge, suspend without pay for a 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.

8. The Personnel Act and Merit Rules do not require a hearing prior to a suspension without pay. Nor is the agency prohibited from seeing information unrelated to the grounds for discipline. The employee must receive notice of the proposed action, which shall include the reasons for the proposed action and the rule, policy, etc. violated. The employee must be given an opportunity to respond orally or in writing before the suspension is imposed. 74 O.S. § 840-6.4; OAC 455:10-11-15.

9. Appellee has failed to prove, by a preponderance of the evidence, that discipline with respect to the documentation of the annual Programs Report in the internal audit was just.

10. Appellee proved, by a preponderance of the evidence, discipline for failing to complete in-service training by June 1, 2013, was just. Appellee failed to prove, by a preponderance of the evidence, that Appellant was insubordinate.

11. Appellee proved, by a preponderance of the evidence, that discipline with respect to Appellant's failure to leave an Acting CMC in place on June 11 and 12, 2013, was just.

12. Appellee proved, by a preponderance of the evidence, that Appellant was insubordinate with respect to her failure to leave an Acting CMC in place on June 11 and 12, 2013.

13. Appellant's conduct justified proceeding to a higher step of discipline before going through all of the lower steps.

14. The agency has failed to meet its burden of proof that the discipline imposed was just under the circumstances when considering the infractions it failed to establish were insubordination, the seriousness of Appellant's conduct as it relates to her duties and responsibilities, the previous disciplinary records of Appellant and the mitigating circumstances.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Appellant's appeal shall be **sustained in part**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Appellant's discipline shall be reduced to a suspension without pay of three (3) days, and Appellee shall pay Appellant back pay for two (2) days.

Signed this 22nd day of January 2014



R. Scott Thompson
Administrative Law Judge
Oklahoma Merit Protection Commission
3545 N.W. 58th Street
Oklahoma City, OK 73112