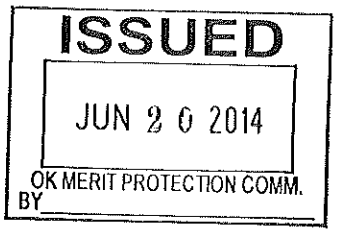
BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

GEORGE MARTINEZ, Appellant,	)	
v.	)	Case No. MPC 14-094
OKLAHOMA OTRD AND RECREATION DEPARTMENT, Appellee.	)	



FINAL ORDER

This matter comes on for hearing on June 13, 2014 before the duly appointed, undersigned Administrative Law Judge (hereinafter "ALJ") at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, George Martinez, (hereinafter "Martinez"), appears personally and through counsel, Blake Lynch. The Appellee, Oklahoma OTRD and Recreation Department (hereinafter "OTRD"), appears by and through counsel, Claudia Connor. Also present for Appellee was Legal Intern, Brett Thomas.

Appellant Martinez was a permanent, classified employee of OTRD, appealing an adverse disciplinary action of discharge. During the administrative hearing, the sworn testimony of witnesses was presented, along with exhibits. Joint Exhibits 1 through 6, 8, 10, 11, and 13 through 17 were offered jointly and were admitted. Appellee offered Exhibit 1, 2 and 3 which were admitted over the objection of the Appellant. (Note: Appellee's Exhibit 2 was originally labeled as Joint Exhibit 7 and Appellee's Exhibit 3 was originally labeled as Joint Exhibit 9 in the Index, filed of record). 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

Martinez has been employed by OTRD as a Carpenter II at Robber's Cave for the last 7 years. The parties stipulated that the Merit Protection Commission (hereinafter "MPC") has jurisdiction of this matter, that Martinez was a permanent, classified employee of OTRD, that Martinez timely filed his appeal and that Martinez was discharged effective October 8, 2013.

On Friday, August 16, 2013, Martinez was working near the Nature Center at Robber's Cave Park when he was confronted by fellow OTRD employee, Donald Stites. A physical altercation ensued at that time, resulting in Stites being taken to the hospital with injuries. The following week, Martinez was suspended with pay pending an investigation into the matter (Joint Exhibits 11 and 14). On September 16, 2013, Martinez was provided with notice of the proposed disciplinary action of termination (Joint Exhibit 15). The notice alleged that Martinez's conduct violated OTRD policy concerning appropriate behavior, as well as violating the workplace violence policy. Specifically, OTRD stated that Martinez's behavior constituted misconduct and conduct unbecoming a public employee. A pre-termination hearing was held on September 27, 2013 and by a letter dated October 8, 2013, OTRD provided Martinez with written notice of termination (Joint Exhibit 16). Martinez alleged that he was acting in self-defense. He timely appealed the disciplinary action to this tribunal.

ISSUES

1. Did OTRD 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.

Michael Prince is a Park Ranger employed at Robber's Cave. Prince testified that he was in the office on August 16, 2013, when he received a radio call to come to the Nature Center. He heard Don Stites saying that "George beat the crap out of me". Prince went to the Nature Center and observed Stites in his truck. He stated that Stites had scrapes on the left side of his face and a cut on his lip. He was also holding his left side and again stated that "George beat the crap out of me". He noted that Martinez had already left the scene when he arrived. Following this

interaction, Prince prepared an incident report (Joint Exhibit 3) noting that Stite's injuries were consistent with his version of the events. He also obtained a voluntary statement from a Park guest, Lynette West (Appellee's Exhibit 1). Prince admitted that he didn't give Martinez a Miranda warning when he took his statement. Prince also admitted that there were some minor inconsistencies in the statements, including the location and the time of day. He admitted that he supplied the names "Don" and "George" to West as she was not personally acquainted with either employee. Prince completed a uniform incident report and delivered it to the Latimer County District Attorney but no criminal charges were filed (Joint Exhibit 8). Prince stated that he couldn't recall the location of the trucks but stated that West noted that Stites pulled up onto Martinez's bumper. Prince admitted that he did not personally witness the confrontation and his knowledge comes entirely from the statements of others. Prince also admitted that it was common knowledge that Stites disliked Martinez. He also stated that Stites was "annoying" at times. He stated that other employees told him that Stites was "as angry as he had ever been" before he went to confront Martinez.

Aron Maib is the Park Manager at Robber's Cave. He testified that he didn't witness the altercation at the Nature Center on August 16, 2013, but he read all of the reports and statements. He stated that immediately after this altercation occurred, Martinez helped Maib with some furniture at the Lodge. He said that Martinez had no visible injuries except perhaps a small cut on his finger. Maib said that Martinez never mentioned the altercation. Once Maib returned to the office, he was told of the altercation and he transported Stites to the hospital. He testified that Stites appeared to be injured, had pain in his chest area, his eye was swollen and he had a cut on his lip. At the hospital, Maib was informed that Stites had 2 broken ribs. He stated that Stites gave him a written statement of what had occurred (Appellee's Exhibit 3). He discussed the OTRD Workplace Violence Policy (Joint Exhibit 2) and said the matter was referred to HR for further investigation and recommendation. Maib admitted that Stites told him that if Martinez was at work the following week, he would hire an attorney, but that the threat didn't influence his actions. He stated that this was said immediately after arriving at the hospital and Stites appeared to be in distress. Maib admitted that he had an "issue" with Stites before and he told Stites that if he had any problems, he was to take it to his supervisor and not handle it himself. He stated that on August 16, Stites clearly had a problem with Martinez but didn't go to his supervisor and chose to address it himself. Maib testified that Martinez had never had any prior

discipline. He also stated that disciplinary action was taken against both employees but Stites resigned in lieu of termination. Maib said that he was concerned that Martinez never reported the altercation to him, even though he saw him immediately afterwards. He testified that Martinez acted as if nothing had happened which is contrary to his claim of self-defense as a result of fear for his personal safety. He also stated that Martinez didn't report that the trucks had collided during the incident.

George Martinez testified that he had been employed at Robber's Cave for 7 years with no prior discipline. He stated that Stites was transferred to his area approximately 4 years prior to this incident. He said he had observed Stites cursing and acting inappropriately in front of the other Park employees and supervisors. He said it appeared that no one did anything about it. He said that on August 16, he was at the Nature Center when he was approached by Arlen, another employee. Arlen needed to get into a cabin to plunge the toilet and Martinez accompanied him to unlock the door and show him how to do it. Afterwards, he returned to the Nature Center. He stated that he was sitting in his truck when Stites pulled up behind his vehicle, blocking him in. He stated that Stites approached his window, his eyes bulging in anger and began yelling and waving his arms around. He said that Stites was yelling "why do you always have to be the boss, telling other people what to do". Martinez told him that if he had a problem, he should see the supervisor. He said that Stites continued yelling. At this time, Martinez had exited his vehicle and Stites was approaching him. He stated that when Stites was approximately 2 feet from him, Stites lunged at him. Martinez stated he pushed Stites away but he kept lunging at him. He said that Stites began cursing at him and lunging, and he felt threatened. He stated he punched Stites three (3) times, twice in the face and once in the side. He stated that he was in fear and was just trying to get away from Stites. He stated that he had never seen Stites that angry before. Martinez stated that he didn't see the point in reporting the incident because there had been many issues before and nothing was done.

DISCUSSION

OTRD argues that it has adopted a zero tolerance policy on violence in the workplace (Joint Exhibit 2). OTRD also argues that the conduct of both employees, in front of a park guest was inappropriate and constituted misconduct and conduct unbecoming a public employee.

Finally, OTRD urges that this one incident of misconduct is so serious that it warrants the discipline of termination.

Martinez claims self-defense and urges that he was in fear which resulted in his conduct. This would be more palatable if he had not exited his vehicle to confront Stites, had merely shoved his fellow employee aside, or if he had hit him only once to defend himself. Martinez's behavior consists of striking a fellow employee three times, by his own admission, hard enough to break his ribs. He also failed to report this incident to his supervisor or to the Park Manager, whom he encountered only minutes afterwards.

While Stites may have been a bully and may have engaged in inappropriate behavior in the past, it does not condone Martinez's behavior, particularly in front of park guests. There is no dispute that the same discipline was proposed for both employees. The label of aggressor is not particularly relevant here, particularly, when there is stated "zero tolerance" for any threats, assaults or other intimidating activity in the workplace. Both employees involved in this incident were treated in a consistent manner.

The goal of progressive discipline is to redirect classified employees toward improved performance and conduct. However, the Merit Rules grant an employer the flexibility to vary penalties if justified by aggravating or mitigating conditions. Clearly, a balance must be struck between the rights of the employee and the need to have governmental operations run safely and smoothly. OTRD has established a clear policy against workplace violence of any kind and has a stated "zero tolerance" for such behavior.

The undersigned has considered all of the facts and circumstances of this case and the testimony of the witnesses. OTRD has met its burden that a violation of policy has occurred. The nature of the misconduct and the injuries to the other employee constitutes an aggravating circumstance which is so serious that Martinez's misconduct warrants termination.

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 OTRD has the burden of proof in an adverse action and must prove by a preponderance of the evidence that just cause exists for the adverse action and that the discipline imposed is just.

4. OAC 455:10-11-14 indicates that termination may be imposed for misconduct and/or conduct unbecoming a public employee.

5. The preponderance of the evidence shows that Martinez's conduct in striking another employee multiple times violates the Workplace Violence Policy, Number P-142. Martinez's conduct is also in violation of OAC 530:10-11-91.

6. Appellee OTRD has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Martinez for his misconduct and violation of policy and his appeal on that ground is denied.

7. 74 O.S. §840-6.3 provides that "each appointing authority shall establish written policies and procedures for progressive discipline of employees according to the rules established by the Oklahoma Merit Protection Commission". It further provides that progressive discipline includes "the flexibility to vary penalties if justified by aggravating or mitigating conditions."

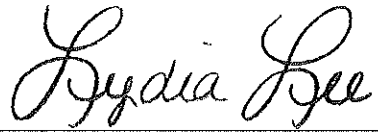
8. OAC 455:10-11-446 provides that "based on relevant circumstances, a single incident may justify a higher step of discipline without proceeding through lower steps of discipline".

9. Appellee OTRD has met its burden to prove, by a preponderance of the evidence, that the discipline of termination was just and appropriate under the circumstances, given the serious nature of the circumstances herein.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant George Martinez, MPC 14-094 be DENIED.

This Order entered this 20th day of June, 2014.



Lydia Lee
Administrative Law Judge