BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

JAQUELYN WARD-HARMON,	)	
	)	
Appellant,	)	
	)	
VS.	)	Case No. MPC 15-090
	)	
OKLAHOMA DEPARTMENT OF HUMAN SERVICES,	)	
	)	
	)	
Appellee.	)	

FINAL ORDER

This matter came on for hearing before R. Scott Thompson, Administrative Law Judge, on August 6, 2015, at the Oklahoma Merit Protection Commission's office in Oklahoma City, Oklahoma. Appellant Jacquelyn Ward-Harmon ("Appellant") appeared in person and through her counsel, Nkem House. Appellee Oklahoma Department of Human Services ("DHS"), appeared through its counsel, Richard Resetaritz, and through party-representative, Andrea Unruh.

Appellant was a permanent, classified employee of Appellee, appealing from an adverse disciplinary action of discharge. The undersigned heard the sworn testimony of witnesses, viewed the exhibits admitted into evidence, and heard argument from counsel. The undersigned admitted into evidence Exhibits 1-35. After receiving all evidence and counsels' arguments, the undersigned closed the record on August 6, 2015.

Upon consideration of the record, the undersigned Administrative Law Judge issues the following findings of fact and conclusions of law pursuant to 74 O.S. § 840-6.7(B).

FINDINGS OF FACT

Appellant was a Child Support Specialist III in the Midwest City Child Support Services office of DHS. At the time of her termination, Appellant had been a DHS employee for approximately nine years, had never been disciplined and had good PMPs. She was terminated effective December 30, 2014. (Ex. 4)

The facts are largely undisputed. Appellant's son ("CR") was the noncustodial parent in a child support case. The case either originated at the Oklahoma City North Child Support Services office or was transferred there from the Midwest City office. Regardless, at the time of the actions forming the basis for termination, the case was assigned to the Oklahoma City North office.

The custodial parent ("NR") and child had been living with Appellant, but NR moved to Texas in July 2014. However, due to lack of child care, the child continued to live with Appellant during July and August 2014. Although the ongoing child support order was entered on July 3, 2014, the file was not built internally at DHS until August 18, 2014. (Exs. 17 and 20). On August 18, 2014, the North Oklahoma City office sent a letter and Affidavit of Payments form to NR at Appellant's address. Although NR had already moved to Texas, her mail was still being delivered to Appellant's residence. Because July and August payments would have been due before August 18, 2014, the Affidavit of Payments form was designed to find out whether any payments had been made for those months so CR would receive credit in the system for any payments made between the date of the court order and the date the file was built at DHS (Ex. 20).

Appellant opened the letter from DHS at NR's request and told her what was

enclosed. During the conversation, it was discussed that CR would start out in arrears on current child support because of the two months and that the child had been living with Appellant during that time. It was also discussed that NR could waive those two months. It is undisputed that she agreed to do so and no evidence was presented that the decision was anything other than voluntary.

Appellant met NR in Ardmore to exchange the child. This was their regular meeting location. Appellant brought the form her Midwest City office used for child support waivers.[1] NR signed the form and also wrote a handwritten note stating she intended to waive July and August 2014, the months referenced in the Affidavit of Payment. However, someone also checked a box on the waiver form indicating waiver of all back child support. Appellant notarized both forms. Appellant returned the waiver form and the handwritten letter to the Oklahoma City North office in the return envelope that had been provided with the August 18, 2014, letter. (Ex. 19)

Although not referenced in the letter from DHS, the child support case also involved back child support due to paternity being legally established years after the child's birth. At the time of Appellant's actions discussed herein, that amount was unadjudicated.[2] Prior to the hearing on back child support, the state's attorney received the waiver form and letter. She directed another employee to contact counsel for NR, who was unaware of the form and letter and stated NR did not intend to waive back

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[1] Testimony and Ex. 32 established the form used was an official Midwest City office form. While testimony indicated the Oklahoma City North office did not use this form, there was no evidence that Appellant was aware the form, or something similar, was not in usage there for waiving child support.

[2] The amount was adjudicated on October 1, 2014. (Ex. 33)

child support.

At the hearing, counsel for NR and CR, as well as the state's attorney were present. CR was not present. NR was not physically present. The state's attorney could not recall if NR was present by phone from Texas. Neither NR's attorney no CR's attorney had been aware of the waiver or letter before the state's attorney told them. NR's attorney accused Appellant of fraud for having altered the documents because her client did not intend to waive back child support. No one testified about any comments made by NR when the subject of the waiver was raised.

Subsequent to this hearing, a referral was made by the Midwest City office's managing attorney to the Office of the Inspector General ("OIG") requesting an investigation into Appellant's actions. (Ex. 15). The allegation was that Appellant "improperly notarized a document signed by the mother of her son's child and possibly changed one of the documents that she notarized." (Ex. 15).

OIG issued a report on November 7, 2014. (Ex. 13) The report stated "OIG was tasked with investigating allegations that [Appellant] may have engaged in inappropriate behavior by altering and then notarizing documentation completed by the custodial parent [NR]." The report found OIG was unable to sustain the primary charge. In fact, there is no evidence Appellant filled out or altered any paperwork for NR. Moreover, it is undisputed Appellant returned both the form, which stated waiver of all back support, and the letter, which clearly identified the two months being waived, to DHS. It is also undisputed that NR signed both forms and there was no evidence her signatures were coerced in any way.

However, the OIG report found that Appellant had discussed waiving past due support with NR and had notarized the documents. OIG determined these actions amounted to conflict of interest and conduct unbecoming a state employee. Thus, the report found Appellant in violation of OAC 340:25-5-124, OAC 340:2-1-8 and OKDHS:2-7-1.

On December 2, 2014, Andrea Unruh, the decision maker for the adverse action, sent Appellant a Notice of Proposed Disciplinary Action – Discharge, along with a copy of the OIG report. (Exs. 1 and 2) The notice essentially regurgitated the OIG report's findings, including the findings that Appellant violated OAC 340:25-5-124, OAC 340:2-1-8 and OKDHS:2-7-1. Appellant was placed on suspension with pay. (Ex. 34) Appellant responded to the Notice on December 8, 2014. (Ex. 3).

A hearing was held before a DHS ALJ on December 18, 2014. The ALJ issued an order on December 22, 2014. (Ex. 5). The ALJ found, and the agency apparently agreed, that Appellant had not committed fraud or altered any documents. However, the ALJ found that notarizing the documents created at least the appearance of impropriety and that the two inconsistent documents (the form and the letter) caused a bifurcation of the hearing and a delay in ruling on child support. Although the ALJ found no ill-will or evil intent, he determined that Appellant should not have notarized the documents and that the agency had therefore established violations of the rules previously cited. However, he found the violations did not rise to a level warranting discharge and recommended suspension without pay. On December 30, 2014, DHS terminated Appellant. (Ex. 4).

As the facts are largely undisputed, the outcome turns on whether the act of discussing the waiver with NR and notarizing the form and letter violate OAC 340:25-5-124, OAC 340:2-1-8 and/or OKDHS:2-7-1.

OAC 340:25-5-124 addresses the assignment and transfer of cases to child support offices. The only reference to conflict of interest is in subsection (9) which states "OCSS reassigns a case to another district office to avoid a conflict of interest under OAC 340:2-1-8." The Instructions to Staff for section 25-5-124 state at subsection 6(3):

> A conflict of interest exists when:
>
> (A) The CP, NCP, or other case participant or party to a case, per OAC 340:2-1-8, is:
>
> (i) a staff member of the assigned district office;
> (ii) related to a staff member; or
> (iii) residing in the staff member's home;
>
> . . .
>
> (C) the relationship between an OCSS staff member and a case participant or other party adversely affects the delivery of services.

This language does not appear in the regulation, but is the agency's guidance to its employees. Clearly, this definition provides that a conflict of interest exists when a staff member is a participant or party to a case assigned to the member's own district office. However, it would not be a conflict of interest for a staff member to be a participant in a case in another district office. The decision-maker in this case, Ms. Unruh agrees. Yet, she also believes that it is a conflict of interest if a participant is related to or resides with a staff member when the case is in another office. In other words, DHS's position is that it is a conflict of interest if a relative is a party to a case in another office, but not if the

employee is the party. That is nonsensical.

This is readily apparent when reviewing the rules regarding alleviating a conflict of interest. As stated in the same set of instructions at paragraph (5), "[w]here there is a conflict of interest, the head of the district office transfers the case to another district office in the same geographical area." This is consistent with OAC 340:25-5-124(9) stating "OCSS reassigns a case to another district office to avoid a conflict of interest under OAC 340:2-1-8." Thus, when a conflict of interest exists, it is alleviated by transferring it away from the district office where the conflicted employee works. Every witness addressing the issue testified this is how conflicts are resolved. In fact, once transferred, the files are separated from the general files for an extra level of protection.

The interpretation that a conflict of interest continues to exist in a case involving a relative of a staff member, even after the case is transferred to another office, means that such a conflict of interest cannot be resolved short of separating the employee from employment. That is an absurd result. According to statute, regulation and Staff Instructions, transfer to another office is how DHS alleviates a conflict of interest. Once the case was transferred to the Oklahoma City North office, Appellant no longer had a conflict of interest.

Even without a conflict of interest, a DHS staff member has restrictions on their actions. DHS claims Appellant violated OAC 340:2-1-8(a). This regulation addresses "other employment, prohibition against use of position for personal gain, and avoidance of conflicts of interest." A reading of this regulation makes it clear that it is targeted primarily at other employment and avoiding conflicts of interest relating to such

employment. For example, the subsection Appellant is alleged to have violated states: "It is vitally important than an OKDHS employee avoid actual and perceived conflicts of interest in activities, such as employment with a provider who contracts with DHS." That has nothing to do with the actions of Appellant.

It was undisputed that Appellant did not work the case. There was no allegation she was involved in any way as a DHS employee. No one alleged she had improperly accessed any information. She had, in total, discussed the waiver of child support with CR and NR, given NR an official Midwest City office form (with which even Ms. Unruh took no issue), notarized said form and returned in by mail.

Once the file was out of her office, no conflict of interest existed any longer. The rules at issue prevent DHS employees from having any official involvement in a relative's case or being in a position to exert any sort of influence over DHS's handling of the case. Nothing in the regulations or statutes prevents a mother from giving advice to her son or to the mother of her grandchild living with her merely because she is also a DHS employee.

The same is true of notarizing the documents. As Appellant testified, notarizing a signature on a document does nothing more than confirm the identity of the signatory.[3] Appellant's notarization merely acknowledged that NR actually signed the documents, a fact that NR has admitted. This matter began with baseless allegations that Appellant had altered and notarized the documents. No one now claims that occurred.

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[3]"In witnessing or attesting a signature the notarial officer must determine, either from personal knowledge or from satisfactory evidence, that the signature is that of the person appearing before the officer and named therein." 49 O.S. § 113.

DHS, however, does claim the notarization of the documents violates section 6(3)(C) of the staff instructions quoted above because it adversely affected the delivery of services. DHS points to the hearing on back child support where the issue of the form and the letter came up and the confusion led to a delay in the order of back child support. Yet, it is clear from the testimony, that it was not Appellant's notarization of NR's signature that caused the problem, but that the letter and form seemed to contradict one another. The same problem would have arisen if the form and letter had been notarized by a notary in Admore, rather than Appellant.

Finally, the agency claims Appellant violated the catch-all provision of OKDHS:2-1-7(i)(5). This provision allows discipline for conduct unbecoming a public employee, which it defines as "any failure by an employee of good behavior either during or outside duty hours, which is of such a nature that it causes discredit to OKDHS." As detailed above, DHS established no wrongdoing by Appellant.

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. 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. 74 O.S. § 840-6.5(C); OAC 455:10-9-2.

4. An appointing authority is required to establish a written progressive

discipline policy designed to ensure consistency, impartiality and predictability with penalties ranging from informal discipline to formal discipline, up to discharge. 74 O.S. § 840-6.3; OAC 455:10-11-4; 455:10-11-11.

5. 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.

6. An agency may impose formal discipline on an employee to correct violations of statute, rule, policy, practice or procedure regarding work performance or behavior. OAC 455:10-11-11.

7. 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.

8. Appellee has failed to meet its burden of proof that just cause existed to terminate Appellant for violating OAC 340:2-1-8.

9. Appellee has failed to meet its burden of proof that just cause existed to terminate Appellant for violating OAC 340:25-5-124.

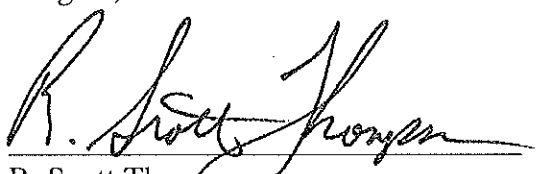
10. Appellee has failed to meet its burden of proof that just cause existed to terminate Appellant for violating OKDHS 2-1-7(i)(5).

11. In accordance with OAC 455:10-9-2(f)(1)(B), upon a finding that just

cause did not exist for the adverse action, a presiding official may order the reinstatement of the employee, with or without back pay and other benefits. A presiding official may also order that documentation of the adverse action be expunged from any and all of the employee's personnel records.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Appellant's appeal is hereby **SUSTAINED.** The discipline imposed upon Appellant is rescinded consistent with this Order. Appellant is to be reinstated to her previous position as a Child Support Specialist III and receive all back pay and benefits to which she is entitled. Further, Appellant's personnel records are to be expunged consistent with this Order.

This Order entered this 10th day of August, 2015.



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