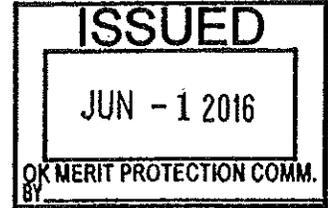


OKLAHOMA MERIT PROTECTION COMMISSION

STATE OF OKLAHOMA



CYNDAL BATES,)
)
 Appellant,)
)
 v.)
)
 OKLAHOMA DEPARTMENT OF)
 CORRECTIONS,)
)
 Appellee.)

Case No. MPC-16-054

FINAL ORDER

This matter came on for hearing on the merits before the undersigned duly appointed Administrative Law Judge on the 10th day of May, 2016 at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant, Cyndal McKendrick-Bates (“Cpl. Bates” or “Appellant”), was present in person and by counsel, Matthew C. Frisby. Appellee, Department of Corrections (“DOC” or “Appellee”) appeared by and through counsel, Michelle J. Minietta, and table representative, Deputy Warden Maurice Warrior.

Appellant, a permanent classified employee working for Appellee, was terminated effective October 29, 2015, pursuant to Merit Rules 455:10-11-14 and 455:10-11-17. DOC terminated Cpl. Bates on the grounds that she violated OP-110215(I)(A)(1), (2), (3), (4), (5), and (7), and OP-110215(II).

The record was opened and the hearing began. Arguments of counsel were heard, and the sworn testimony of five witnesses for Appellee and one witness for Appellant was presented.

Exhibits were introduced as Joint Exhibits 1-16, without objection from either party. Joint Exhibits 1-16 are incorporated herein and made a part hereof.

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

WITNESSES

Lieutenant Shawn Horvat (Witness for Appellee). Lt. Shawn Horvat (“Lt. Horvat”) has been with DOC for nineteen years and has spent two and one-half years as a Lieutenant at the Oklahoma State Penitentiary (“OSP”). His duties include supervising all staff and offenders in the unit to which he is assigned, and Cpl. Bates was under his supervision at the time of the actions relevant to the termination and this appeal. Lt. Horvat provided testimony regarding the events upon which Cpl. Bates’ termination were based, including her behavior that he considered insubordinate related to his request that she complete an incident report being tardy to work and her reactions thereto, problems related to a fence check Cpl. Bates was directed to perform, and her actions during a conversation between Lt. Horvat, Lt. Major, and Cpl. Bates. The undersigned found Lt. Horvat to be a credible witness.

Lieutenant Kevin Major (Witness for Appellee). Lt. Kevin Major (“Lt. Major”) has been employed by DOC since September, 2003, and at the times relevant hereto, has been working as an Intelligence Lieutenant. He believed that he had occasionally supervised Cpl. Bates, but did not recall any specific instances related to his supervision of her. During part of the time relevant to this appeal, Lt. Major was at OSP to investigate allegations of misbehavior by an offender. He witnessed some of the acts that led to Cpl. Bates’ termination. The undersigned found Lt. Major to be a credible witness.

Sergeant Jimmy Reynolds (Witness for Appellee). At the time of the incidents leading to Cpl. Bates' termination, Sergeant Jimmy Reynolds ("Sgt. Reynolds") worked as a Control Room Sergeant on the OSP unit to which both Cpl. Bates and Lt. Horvat were assigned. Sgt. Reynolds presented testimony relevant to the fence check related to Cpl. Bates' termination and department procedures for completion of incident reports. The undersigned found Sgt. Reynolds credible.

Captain Jacky Parker (Witness for Appellee). Captain Jacky Parker ("Capt. Parker") is a Correctional Security Manager II at OSP. He supervises the daily activities of OSP security staff, including both Cpl. Bates and Lt. Horvat. Capt. Parker testified about Cpl. Bates' general performance and interaction with multiple supervisors and several incidents related to Cpl. Bates' termination. The undersigned found Capt. Parker to be a credible witness.

Deputy Warden Maurice Warrior (Witness for Appellee). Deputy Warden Maurice Warrior ("Warden Warrior") was the Appellee's table representative during the proceeding, was present during all portions of the hearing, and heard all testimony of other witnesses. Warden Warrior has been with DOC for twenty-eight years, and as the Deputy Warden of Operations is the second in charge at OSP. At times, including some of the times relevant to this appeal, Warden Warrior was in direct control and charge of OSP due to the absence of the Warden. Although Cpl. Bates' notice of termination bears the signature block of Warden Anita Trammell, Warden Warrior actually signed the notice. Warden Warrior testified that the decision to terminate Cpl. Bates was made by Warden Trammell, but that he concurred with her decision. Warden Warrior testified on many subjects, including how Cpl. Bates' actions violated DOC policy, the application and meaning of DOC policies relevant to the termination, DOC's view of bullying and powerbullying, Cpl. Bates' prior discipline, and both Cpl. Bates and

Lt. Horvat's interaction with each other and general performance. The undersigned found Warden Warrior to be a credible witness.

Cyndal McKendrick-Bates (Witness for Appellant). Cpl. Bates worked for DOC from June, 2014, until her termination on October 29, 2015. She began as a cadet and advanced to Corporal after approximately one year. Cpl. Bates was assigned to a number of units at OSP. Cpl. Bates was present during the entire proceeding and heard the testimony of all other witnesses. She testified regarding her prior discipline and her actions related thereto, the incidents upon which her termination was based, including the incident report related to her tardiness, and her conversation with Capt. Parker and Lt. Horvat following an incident regarding a fence check. She also testified to the facts surrounding the fence check incident, Lt. Horvat's conduct that she considered to be bullying or powerbullying, and her complaints to OSP staff regarding Lt. Horvat's treatment of her.

Cpl. Bates' demeanor was calm and collected. Her demeanor and answers to several questions indicated a general and strong belief that her actions in the incidents leading to her termination and her prior discipline was fully justified and that the others involved were fully in the wrong.

With regard to her prior disciplinary letter of reprimand, she seemed to feel fully justified in departing OSP without leave at the end of a shift even though she had been directed to stay for another shift on the basis that she had told OSP she couldn't stay because she had to pick up her kids. She fully denied using the foul language upon which her prior suspension without pay was based, even though the actions had been witnessed by several co-workers. She clearly felt fully justified in her actions related to the incident report and conversation with Capt. Parker and Lt. Horvat upon which her termination was based.

At times, Cpl. Bates' explanation for why she was in the right seemed based on minutia with a blind eye to the overriding issue of insubordination. For example, justifications for not delivering an incident report to Lt. Horvat when requested included that she didn't believe the report was due until the end of her shift (a position clearly consistent with DOC written policy), she "had issues" with what Lt. Horvat wanted her to write in the report (that she was late and why she was late), that she had already written a report intended for Capt. Parker rather than Lt. Horvat, and that she wanted someone else to read the report before she delivered it. Some of her explanations, taken alone, seem reasonable. DOC written policy does, in fact, indicate that incident reports are due by the end of the shift, and Cpl. Bates submitted two incident reports by the end of her shift. However, taken together, Cpl. Bates explanations for not delivering the incident report to Lt. Horvat when directed to do so ring hollow and ignore the bigger issue of her general conduct toward her supervisors.

There were minor inconsistencies in Cpl. Bates' testimony. For example, she testified that the first time she complained to Capt. Parker that Lt. Horvat was bullying her was on September 17, 2015. She then immediately contradicted herself by saying that she had previously complained to Capt. Parker about Lt. Horvat's bullying, and that Capt. Parker did nothing about it. The undersigned interrupted questioning to ask Cpl. Bates to address the inconsistency. Her response was that she may have just testified that her bullying complaint was made to Capt. Parker for the first time on September 17, 2015, but that she had made the complaint to him before that time. In addition, Cpl. Bates testified that Lt. Horvat instructed her to complete an incident report regarding her tardiness at around 6:00 a.m. on September 17, 2015, and that when he asked her for the report around noon on that date, she had not prepared one because she had been busy. She also testified, however, that when Lt. Horvat requested the

report around noon, she had one in her pocket that she had prepared, intending a co-worker to review it before delivering it to Capt. Parker rather than Lt. Horvat. Later, she testified that she didn't complete the report as requested because she had issues with what Lt. Horvat wanted her to put in it. The explanations are inconsistent.

PRIOR DISCIPLINE

Cpl. Bates received two disciplinary actions prior to the disciplinary action that led to her termination. Both were related to similar conduct upon which her termination was based; each incident included failure to follow directives and a problematic attitude toward supervisors.

Cpl. Bates received a letter of reprimand on June 9, 2015 for leaving OSP without being properly relieved and in violation of orders given by her supervisor. In addition, on August 21, 2015, Cpl Bates received a three day suspension without pay for multiple refusals to follow directives of supervisors and use of foul and insubordinate language.

The incidents that led to Cpl. Bates' termination occurred less than one month after she returned to work from her suspension without pay.

CURRENT DISCIPLINE (TERMINATION)

DOC terminated Cpl. Bates for (1) being insubordinate by refusing to write an incident report documenting that she reported late for work on September 17, 2015 after receiving multiple instructions to do so by her supervisor, Lt. Horvat, and one directive given by her superior, Lt. Major and only completing the report after being directed to do so by Capt. Parker, and (2) acting in an insubordinate manner during a conversation with her supervisors, Lt. Horvat and Capt. Parker on September 23, 2015, regarding the importance of following directives given by superior officers. The central basis of Cpl. Bates' termination is insubordination.

OSP conducts a briefing before the beginning of each shift. The purpose of the briefing is to inform security personnel, including personnel working in Cpl. Bates' capacity, of events that occurred at OSP during the prior two shifts so that security personnel can be apprised of any information that might affect security or operations. For the shift beginning at 6:00 a.m., the briefing begins at 5:45 a.m. Each DOC security officer is required to attend and is paid overtime for the extra fifteen minutes. Both Lt. Horvat and Lt. Major testified that briefings are both mandatory and critically important for safety and security purposes.

On September 17, 2015, Cpl. Bates was required to report for the 5:45 a.m. briefing. She appeared at approximately 5:55 a.m., toward the end of the briefing. She testified that she had called in to advise OSP that she would be late. Lt. Horvat testified that because Cpl. Bates had been late several times, had received prior verbal warnings, but tardiness continued to be a problem, he instructed Cpl. Bates to complete an incident report stating that she was late and why she was late. Cpl. Bates stated that she would prepare the incident report.

Cpl. Bates and Lt. Horvat each went about their duties. At around noon, Lt. Horvat went to the control room and had Sgt. Reynolds call Cpl. Bates in. He asked Cpl. Bates whether she had completed the incident report he had requested around 6:00 a.m. She stated that she had not, and that she had been busy with duties. At that time, Cpl. Bates had an incident report regarding her tardiness that she had prepared and intended to have a co-worker review before delivering the report to Capt. Parker in her pocket (Report #1). Report #1 was not introduced into evidence. Cpl. Bates took Report #1 out of her pocket, threw it in the trash in front of Lt. Horvat and Lt. Major, and asked Lt. Horvat what he wanted her to write in the report. He stated that he wanted her to write a report stating she was late. She then sat down and prepared an incident report in front of Lt. Horvat and Lt. Major ("Report #2). Report #2 was introduced as Joint Exhibit 4,

Page 1. Initially, Cpl. Bates filled out all of Report #2 with the exception of the hand-written comments contained in the "Detailed Description of Incident" section, and handed the report to Lt. Horvat. Because Report #2 was initially completely devoid of content, incorrectly dated, and bore only Cpl. Bates' printed name rather than signature, Lt. Horvat returned Report #2 to Cpl. Bates and requested that she properly complete it. Cpl. Bates then added to Report #2 the hand-written comments in the "Detailed Description of Incident" section of Report #2 and returned it to Lt. Horvat. Her hand-written addition to Report #2 stated, "On above date and approx. time this R/O spoke to Cpt. Parker about the circumstances regarding this incident report, and was told to report to him. End of report."

Lt. Horvat explained that he had requested an incident report regarding Cpl. Bates tardiness, and that Report #2 was still inappropriate and unacceptable because it did not address the subject. Lt. Horvat testified that, at that point, Cpl. Bates displayed a "huffy attitude, like a child" and wrote another incident report (Report #3). When Cpl. Bates completed Report #3, she did not hand it to Lt. Horvat, but started to leave the control room with the report. When Lt. Horvat requested she hand Report #3 to him, Cpl. Bates stated that she wanted to make a copy of the report before turning it in. He stated that she would receive a copy of the report after it had been signed by Capt. Parker. Cpl. Bates then threw Report #3 in the trash, and began writing another incident report. Report #3 was not introduced into evidence, and apparently never retrieved from the trash.

Cpl. Bates then completed a new incident report (Report #4) and handed it to Lt. Horvat. Report #4 was introduced into evidence as Joint Exhibit 4, Page 2. Report #4 was unacceptable to Lt. Horvat because it still did not contain an admission on Cpl. Bates part that she had been tardy. Rather, Report #4 stated "On above date and time I was told by Lt. Horvat to write an

incident report saying I was late to work. I was then told I could not make a copy of this report for my records. EOR” Lt. Horvat explained to Cpl. Bates why Report #4 was unacceptable and requested that she complete the requested report, indicating that she had reported late that morning. Lt. Major was present in the control room at this time, and attempted to explain to Cpl. Bates that she needed to complete the requested report. Lt. Major testified that Cpl. Bates was refusing to do as instructed, which caught his attention, that she was visibly upset and he considered her behavior to be unnecessarily emotional. He stated that Lt. Horvat was clearly requesting a report stating simply that Cpl. Bates had been late, and that she was disrespectful when she threw a report in the trash. Lt. Major testified that he did not hear Cpl. Bates use any foul language, but that she raised her voice to Lt. Horvat.

Cpl. Bates refused to complete another incident report for Lt. Horvat. Lt. Horvat left the control room and contacted Capt. Parker about the incident. Capt. Parker instructed Lt. Horvat to send Cpl. Bates to Capt. Parker’s office.

Capt. Parker testified that he recalled Cpl. Bates coming to his office to discuss the incident report regarding her tardiness. He recalled that she had been tardy before. Capt. Parker asked Cpl. Bates to write another incident report, because the incident report she presented to him, stating that Lt. Horvat asked her to write a report stating she was late, didn’t pertain to the issue. He believes Cpl. Bates was upset about the way Lt. Horvat had treated her. Cpl. Bates provided two incident reports to Capt. Parker, which were introduced into evidence as Exhibit 4, Page 3, and Exhibit 4, Page 4. Both incident reports indicated Cpl. Bates was tardy for work on September 17, 2015, and both were submitted to Capt. Parker prior to the end of Cpl. Bates’ shift.

In addition to the facts surrounding the incident report, the final notice of termination stated that Cpl. Bates was insubordinate during a conversation she had with her supervisors, Capt. Parker and Lt. Horvat, on September 23, 2016. On that date, Lt. Horvat instructed Sgt. Reynolds to send one of his officers on a fence check. Sgt. Reynolds instructed Cpl. Bates, in Lt. Horvat's presence, to conduct the check. Lt. Horvat testified that Cpl. Bates said, "what fence check", and that Lt. Horvat responded by saying, "the same fence check you did the other day". Sgt. Reynolds testified that Cpl. Bates stated she did not know how to do a fence check, which concerned him. Sgt. Reynolds and another officer explained how to conduct a fence check to Cpl. Bates. Cpl. Bates subsequently contacted Capt. Parker to inquire about the fence check.

That Cpl. Bates asked multiple superiors how to conduct a fence check concerned Capt. Parker, because she had already been trained on how to do it, and because she continued to ask additional superiors after she had already been instructed on the matter. Cpl. Bates testified that her questions were not about how to perform a fence check, but about the area in which to conduct the fence check, and that she continued to ask because she did not receive a clear answer.

The manner in which Cpl. Bates inquired about the fence check was not a stated basis for her termination. However, a conversation that occurred between Cpl. Bates, Capt. Parker, and Lt. Horvat, about the fence check is a stated basis for termination. Later in the day, after Cpl. Bates had completed the fence check, Capt. Parker and Lt. Horvat stopped Cpl. Bates and talked to her to express concerns about their perception that Cpl. Bates had difficulty following directives given to her by superior officers. During the conversation, Cpl. Bates became emotional and upset, and walked away while the conversation was still occurring. Lt. Horvat and Capt. Parker instructed Cpl. Bates to return to the conversation several times. She finally reluctantly complied.

During the remainder of the conversation, Cpl. Bates became more agitated and emotional, so Capt. Parker ultimately instructed her to return to her unit. While walking away from the conversation, Cpl. Bates made comments under her breath. Both Lt. Horvat and Capt. Parker considered Cpl. Bates' conduct to be insubordinate and further evidence of Cpl. Bates' problem following directives given by supervisors.

Cpl. Bates defended her actions on three basic grounds. First, she argued that she complied with Appellee's policy by turning in the incident report regarding her tardiness by the end of her shift. There is no question that she did, in fact, submit incident reports prior to the end of her shift. While DOC policy clearly provides that incident reports be submitted by the end of a shift, the policy clearly contemplates review of the incident report by superiors and submission thereafter. Moreover, the policy does not create a right of an employee to refuse to deliver an incident report when requested by a superior simply because the employee's shift has not ended. In addition, a rule providing an incident report is due by a specific time does not excuse the manner in which Cpl. Bates went about submitting the report, or the way she responded to her supervisor's directives.

Second, Cpl. Bates argued that she did not have time to complete the report as requested because she was busy with other duties. However, the argument ignores the fact that Cpl. Bates actually had a completed incident report in her possession the first time Lt. Horvat reminded her to turn in the report and requested it. She elected not to provide the incident report to him, but engaged instead in the drafting of various reports that struck the undersigned as games-playing for the purpose of being difficult.

Cpl. Bates' main argument, however, is that Lt. Horvat singled her out and bullied her constantly. She testified that Lt. Horvat did not treat her like the other officers, and that when she

first started asking him questions, he began responding with “smart aleck” comments. She believed that Lt. Horvat had bullied her on prior occasions and that he was bullying her when he was requesting the incident report. She stated that she had complained of Lt. Horvat’s treatment of her to Capt. Parker and told Capt. Parker that Lt. Horvat didn’t like her. Capt. Parker confirmed that Cpl. Bates had complained of Lt. Horvat’s treatment of her, but stated that she had also complained that all of her other superiors had bullied her as well. Capt. Parker testified that DOC takes bullying seriously, and that he did not consider Lt. Horvat’s treatment of Cpl. Bates as bullying. Rather, he believed Lt. Horvat was simply doing his job by instructing and correcting Cpl. Bates. Both Lt. Horvat and Capt. Parker acknowledged that Lt. Horvat, who has a military background, has a very serious and direct demeanor. Lt. Horvat testified that he did not treat Cpl. Bates differently than any other officer he supervised. Capt. Parker testified that Lt. Horvat’s demeanor is an asset to DOC, particularly in the environment in which security officers work.

For her part, Cpl. Bates admitted that Lt. Horvat did not make excessive demands of her. She admitted that Lt. Horvat never gave her any impossible work assignment. She agreed that Lt. Horvat didn’t give her any assignments that were clearly unnecessary, but believed that Lt. Horvat required her to conduct certain assignments over and over again rather than spreading the assignments over multiple officers. Cpl. Bates agreed that Lt. Horvat never asked her to do anything that was beneath her. She believed that Lt. Horvat didn’t like her, was trying to get her fired, and that nothing she did was ever good enough for him.

FINDINGS OF FACT

1. All prior and subsequent statements that are properly findings of fact are incorporated herein as findings of fact.

2. The parties stipulated:
 - (a) that the Merit Protection Commission has jurisdiction over this matter;
 - (b) that the Merit Rules apply;
 - (c) that Appellant was a permanent, classified employee of Appellee; and
 - (d) that Appellant was terminated effective October 29, 2015.

All stipulations are incorporated herein as findings of fact.

3. Cpl. Bates refused to provide the incident report as instructed by her supervisor, Lt. Horvat. Her conduct surrounding the incident report on September 17, 2015, was disrespectful to her supervisor. Her conduct was insubordinate and in violation of DOC policy, and constitutes grounds for discipline.

4. Cpl. Bates' conduct during her conversation with Lt. Horvat and Capt. Parker on September 23, 2015, was insubordinate. Her conduct was in violation of DOC policy, and constitutes grounds for discipline.

5. There is insufficient evidence to find that Lt. Horvat bullied Cpl. Bates in any way.

6. The Appellee followed progressive discipline.

7. The discipline imposed in this circumstance was just and appropriate under the circumstances.

8. Cpl. Bates was given appropriate notice of pre-termination hearing, participated in a pre-termination hearing, and was given proper notice of final discipline.

CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and subject matter in the above-entitled matter.

2. Any findings of fact that are properly conclusions of law are so incorporated herein as conclusions of law.

3. Merit Rule 455:10-11-17 provides that a permanent classified employee may be discharged for any reason stated in Merit Rule 455:10-11-14.

4. Merit Rule 455:10-11-14 states that a permanent classified employee may be discharged for cause for behavior amounting to insubordination, or for any other just cause.

5. Merit Rule 455-10-9-2 states that the Appellee bears the burden of proof in an adverse action and must prove by a preponderance of the evidence that just cause exists for the action taken and that the discipline imposed was just.

6. The Personnel Act and Merit Rules provide that an 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. OP-110215 (I) requires DOC employees to, *inter alia*, devote their full time and attention to duties during working hours, engage in conduct that affords respect and courtesy to others, and conduct work in a manner that contributes to and supports a safe work environment.

8. OP-110215 (II) provides, *inter alia*, that DOC employees comply with all agency rules and regulations, policies and procedures, and all written and verbal directives, including lawful orders of supervisors. In addition, the rule defines insubordination as follows:

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, will be considered insubordination.

9. OP-110215 (VIII) (C) defines bullying as “repeated inappropriate behavior, either direct or indirect, whether verbal, physical or otherwise, conducted by one or more employees against another or others, at the place of work and/or in the course of employment.” The rule further defines power bullying as follows:

Power Bullying: Making excessive demands, such as assigning work that is impossible to perform or is clearly unnecessary. Making demeaning demands, such as assigning work that is clearly below the employee’s ability or experience or assigning no work at all. Intruding or invading into the employee’s personal life. Socially or excluding or disregarding a person in work-related activities.

10. Appellee, Department of Corrections, has met its burden to prove, by a preponderance of the evidence, that Appellant committed insubordination by: (a) refusing to complete an incident report *as directed by her superior officer* on September 17, 2015, and (b) treating her superior officers with disrespect during a conversation on September 23, 2015.

11. There is no credible evidence that Appellant was bullied by any DOC employee, including her supervisor, Lt. Horvat.

12. Appellant’s insubordination was in violation of the DOC policies set forth above, and warranted discipline.

13. Appellee has further met its burden to prove, by a preponderance of the evidence, that it followed all procedural prerequisites to the disciplinary action, including the principles of progressive discipline.

14. Appellee has further met its burden to prove, by a preponderance of the evidence that just cause exists for the action taken and that the discipline imposed was just and appropriate under the circumstances.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant is hereby **DENIED** and Appellant's termination is sustained.

DATED this 31st day of May, 2016.



Matt Hopkins, OBA# 16666
Administrative Law Judge
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