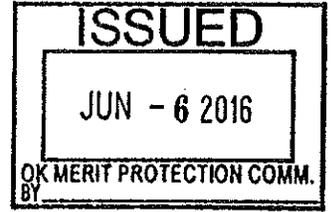


**OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**



FIDEL AUGUST,)
)
)
 Appellant,)
)
)
 v.)
)
 DEPARTMENT OF CORRECTIONS,)
)
)
 Appellee.)

Case No. MPC-16-064

FINAL ORDER

This matter came on for hearing on the merits before the undersigned duly appointed Administrative Law Judge on the 24th day of May, 2016, at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant, Fidel August (“Cpl. August” or “Appellant”), appeared in person and by counsel, Matthew C. Frisby. Appellee, Department of Corrections (“DOC” or “Appellee”) appeared by and through counsel, Michelle J. Miniotta, and table representative, District Supervisor, Jeff Woody.

Appellant, a permanent classified employee of Appellee, was terminated effective November 12, 2015, pursuant to Merit Rule 455:10-11-14 and 17, OP-110215 (I)(A)(1) and (II)(D). DOC’s essential complaint against Appellant was that he allegedly failed to devote his full time, attention, and effort to his duties, and thereby failed to fulfill the duties of his position.

The record was opened and the hearing began. Arguments of Appellant and Appellee were heard, and the sworn testimony of three witnesses for Appellee and one witness for Appellant was received. Exhibits were introduced without objection as Joint Exhibits 1-14, and Appellee’s Exhibits 1 and 5, all of which are incorporated herein and made a part hereof.

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

WITNESSES

Lieutenant Carl Vick (Witness for Appellee). Lt. Carl Vick (“Lt. Vick”) has been a correctional officer with DOC for eleven years and at all times relevant to this appeal oversaw all security officers, daily operations of the facility, and reported to the Chief of Security. Lt. Vick testified that the Altus Work Center (“AWC”) is a minimum security facility that works to ease inmates back into society. He testified that because AWC is a low security system, it is extremely important for security officers to know where inmates are and what they are doing at all times. Lt. Vick provided testimony regarding the nature of store runs, by which security officers escort inmates to local stores to purchase items that they need, and stated that the local stores are used as the inmates’ “canteen”. He stated that officers may take a maximum of ten inmates on any store run, and that he has conducted many store runs. He testified that a security officer should pat down each inmate going on a store run, load the inmates on a facility van, drive them to the store, supervise them while they shop and check out items, return the inmates to the facility, and check the inmates’ shopping bags upon return. He testified that he has never had a problem on a store run.

Lt. Vick testified that he received a call from a friend whose mother manages the Dollar General in Altus. The friend informed him that an officer had allowed an inmate to purchase beer and cigarettes on a store run on October 11, 2015. Initially, Lt. Vick ignored the call, because he did not believe it was possible. When he got a second call urging him to review the store’s video footage of the alleged incident, he traveled to the store and watched the video that was introduced as Joint Exhibit 4.

From the video, Lt. Vick determined that Cpl. August had escorted two inmates to the Dollar General and that one of the inmates had, in fact, purchased beer and cigarettes before leaving the store. The video concerned Lt. Vick because:

1. The inmates were not dressed appropriately and looked too much like civilians;
2. Cpl. August left one inmate outside the store unsupervised while Cpl. August and the other inmate were in the store;
3. An inmate purchased beer and cigarettes while under Cpl. August's supervision;
4. Cpl. August failed to adequately supervise the two inmates under his control.

Lt. Vick participated in the investigation of the incident. He interviewed Cpl. August, collected statements from various witnesses, and prepared the incident report admitted as Joint Exhibit 3. He was not involved in the decision to terminate Cpl. August.

The undersigned found Lt. Vick to be a credible witness.

Scotty Rushing (Witness for Appellee). Scotty Rushing ("Mr. Rushing") was the store clerk working at the Altus Dollar General during the store run upon which Cpl. August's termination was based. He observed Cpl. August and the two inmates during the store run, exchanged some cigarettes for Cpl. August (Cpl. August had mistakenly purchased the wrong brand of cigarettes from the store earlier in the day and returned them to exchange for the correct brand during the store run in question), and checked out both inmates and bagged their purchases. Mr. Rushing was aware that Cpl. August entered the store with two other men, and knew that one of the men was an inmate because the word "inmate" was printed on his shirt.

Mr. Rushing identified Appellee's Exhibit 1 as the statement he wrote of the events during the store run about a week after the run occurred. He testified that he felt forced to write the statement, and clarified on cross-examination that, by this, he meant the request for the

statement had come out of the blue, but the DOC officer who requested the statement told him that he was not personally in trouble. While Mr. Rushing's statement indicates that Cpl. August purchased four packs of cigarettes, he agreed that the store video clearly shows Cpl. August purchasing only one pack. He could not explain the discrepancy.

During the hearing, Mr. Rushing watched the store video (Joint Exhibit 4) from both camera angles and described both what he saw on the video and what he recalled of the incident. He testified that at times during the store run, Cpl. August was at the counter and did not appear to be watching the inmates while they shopped. He testified that he believed Cpl. August knew that an inmate purchased both beer and cigarettes because Cpl. August was standing only a few feet away when the purchase was made. He also specifically and strongly stated that Cpl. August looked directly into his (Mr. Rushing's) eyes while the inmate purchased the beer and cigarettes, and then turned his head away. However, review of the store video from both Camera One (toward the store front) and Camera Two (toward the register) clearly indicates Cpl. August was not looking at the clerk or toward the register during the purchase, and also indicates that Mr. Rushing was not looking toward Cpl. August at the time the cigarettes and beer were purchased. This discrepancy brought Mr. Rushing's credibility into question in the eyes of the undersigned.

District Supervisor Jeff Woody (Witness for Appellee). Jeff Woody ("Mr. Woody") is the District Supervisor for the Southwest District of DOC. In this capacity, Mr. Woody oversees all aspects of the Altus Work Center. He has been with DOC for twenty-eight years. Mr. Woody was the appointing authority in this case, and signed the termination letter. He was the Appellee's table representative during the proceeding, was present during all portions of the hearing, and heard all testimony of other witnesses.

In investigating the incident, Mr. Woody reviewed Lt. Vic's report (Joint Exhibit 3), Chief of Security Newton's report (Joint Exhibit 2), reports prepared by two inmates, Mr. Rushing's report, and the store video from both Camera One and Camera Two. Based on his investigation, Mr. Woody's primary concern was that Cpl. August had clearly failed to properly supervise inmates during the store run when he had only two inmates (as opposed to the maximum of ten) to supervise. He allowed one inmate to be outside the store while he and the other inmate were in the store, and the store run resulted in one inmate clearly purchasing contraband. He testified that contraband can lead to assault and extortion among inmates, and that it is a serious security concern in the facility.

Mr. Woody testified that he had promoted Cpl. August to the rank of Lieutenant in May of 2015. He testified that, although Cpl. August had received a letter of reprimand four months before the promotion related to his attitude and for watching a movie during work hours, he promoted him anyway because he believed Cpl. August could "deal with it". He subsequently demoted Appellant back to the rank of Corporal during the promotion trial period because "he wasn't working out in the position of Lieutenant". Mr. Woody stated that Cpl. August's reinstatement to his former, lower rank was not a disciplinary action, but an administrative action.

Mr. Woody issued the pre-termination letter, conducted the pre-termination hearing, and issued the letter of termination. He stated that he considered Cpl. August prior disciplinary action (all of which he related to Cpl. August's failure to devote full attention to his job and duties), the arguments of Cpl. August's counsel at the pre-termination hearing, the contents of the video, and the statements made in the investigation. In addition to Cpl. August's behavior related to the store run, Mr. Woody considered allegations, supported by video evidence, that Cpl. August had

entered the Chief of Security's office for no reason, and that he may have asked an inmate to watch the hall for him while he did so (this alleged incident was not a stated basis of termination). Mr. Woody considered a suspension without pay rather than termination. He reported his findings and supporting materials "up the chain of command" and the decision was made to terminate Cpl. August. Mr. Woody agreed with this determination.

The undersigned found Mr. Woody to be a credible witness.

Fidel August (Witness for Appellant). Cpl. August was present during the entire proceeding and heard the testimony of all witnesses. Cpl. August began working for DOC on April 26, 2012. He graduated second in his class from the Academy and began working at the Altus Work Center as a Cadet. Within six months he was promoted to Corporal, which he considered to be a fairly slow transition time.

Cpl. August testified that he had done several store runs with other inmates on October 11, 2015, and ended the day with the store run in question. He admitted exchanging a pack of cigarettes on his own behalf during the store run. He testified that during the store run, inmate McNeil became agitated because the store did not have a product he wanted and because Cpl. August declined to take him to another store to look for it. He testified that inmate McNeil attempted to purchase beer, but that he told him no and returned the beer to its display case. The video clearly shows both inmate McNeil's agitation and Cpl. August returning the beer McNeil attempted to purchase. He testified that, during this time, his focus was on inmate McNeil in an attempt to handle the inmate's agitation in public, and that he directed McNeil to return to the van unsupervised in order to extricate him from members of the public in the store. He testified that he instructed the store clerk, Mr. Rushing, that the inmates were not allowed to purchase alcohol, cigarettes, or glass containers.

Cpl. August denied seeing inmate Ocampo purchase cigarettes or beer. He denied making eye contact with the clerk, Mr. Rushing, during this purchase. The store video is consistent with both claims.

Cpl. August testified that when he left the store, he stopped to respond to text messages regarding health issues of his newborn son. At this time, inmate McNeil was in the van, and Cpl. August saw inmate Ocampo near the store's trash can. Cpl. August did not search either inmate before returning to the facility. He drove the inmates back to the AWC, dropped them off so they could enter the AWC lobby, parked the van, filled out his van logs, and conducted his checks of the AWC vehicles in the facility parking lot. When he entered the AWC lobby approximately five minutes after dropping off the inmates, neither inmate was present.

Cpl. August testified that when Lt. Vick first asked him about the store run a few days later, he told Lt. Vick that he had not worked that night, but stated that he later determined he had – that he had forgotten he had changed shifts and was on duty the evening in question. When he was interviewed about the matter, he believed the Chief of Security was accusing him of purchasing beer and cigarettes for the inmates. When he demanded to see the video, he was shown only two sections – one section with Cpl. August holding a beer (which he had taken from inmate McNeil and returned to its display), and one section of inmate Ocampo purchasing cigarettes.

Cpl. August estimated that in four years he has made thousands of store runs, and that he had made several that day. He admitted that he should have paid more attention, that he was negligent in his duty. He stated that he was at fault for relying on the store clerk to tell him if either inmate purchased any contraband. He denied knowing inmate Ocampo purchased beer and cigarettes and believed, after reviewing the video, that inmate McNeil intentionally distracted

him so that inmate Ocampo could make the contraband purchase. Review of the video is consistent with this conclusion.

Cpl. August testified that he had four PMPs and that he met standards on each of them. He acknowledged the prior discipline he has received, and testified that he changed his behavior after each prior discipline.

The undersigned found Cpl. August to be a credible witness.

PRIOR DISCIPLINE

On May 7, 2014, Cpl. August received a Letter of Concern related to improper entries in log books for tools, sharps, and restraints, which amounted to failure to complete duties as assigned. On January 9, 2015, Cpl. August received a Letter of Reprimand for insubordination and for failing to devote full time, attention and effort to duties by playing on his phone and watching movies on a facility computer. He received another Letter of Reprimand on October 12, 2015¹, for insubordination related to failing to follow directives given by a superior and, again, for failure to devote full time, attention, and effort to duties.

Mr. Woody testified that Cpl. August's prior discipline was based on the same behavior – failure to devote full time, attention and effort to duties – as the behavior that led to his termination. DOC argued that this indicates Cpl. August is unlikely or unable to correct his behavior. Cpl. August testified, however, that in each instance of prior discipline, he had corrected the behavior and not repeated the actions for which he was disciplined. His counsel argued that the failure to devote full time, attention and effort to duties standard is so broad that it could literally embrace any erroneous behavior of an employee.

CURRENT DISCIPLINE (TERMINATION)

¹ Both the pre-termination letter and the termination letter issued by DOC refer to this final prior disciplinary action by the date October 7, 2015. However, the actual Letter of Reprimand, introduced as Joint Exhibit 9, bears the date October 12, 2015.

It is clear from the evidence that Cpl. August failed to devote his full time, attention, and effort to his duty to supervise two inmates on a store run on October 11, 2015. He admitted as much. Whether there was basis for discipline in this case, then, is determined. Appellee clearly had grounds upon which to discipline Cpl. August. The only question is whether the discipline imposed is fair and just under the circumstances within the constraints of the principles of progressive discipline.

There is no evidence that Cpl. August intentionally allowed an inmate to purchase contraband. This determination could not be reached by the undersigned. And yet, the appointing authority, Mr. Woody, testified that he determined Cpl. August's behavior during the store run was not a simple mistake; that if "it was not intentional, it was a lack of performing his duties." To the extent the appointing authority reached the conclusion Cpl. August intentionally allowed an inmate to purchase beer and cigarettes, the undersigned finds that the conclusion is without support.

Had Cpl. August intentionally allowed an inmate to purchase contraband, his conduct would clearly warrant termination. However, because no evidence supports such a finding, and the only reasonable conclusion is that Cpl. August failed to adequately supervise the inmates during a store run, a significant suspension without pay is more consistent with the principles of progressive discipline. The appointing authority, having seen the evidence, considered a suspension without pay, but ultimately embraced the decision of persons higher up the chain of command to terminate Cpl. August's employment. The undersigned finds that the decision to terminate rather than suspend without pay was unwarranted under the circumstances.

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 November 12, 2015.

All stipulations are incorporated herein as findings of fact.

3. Cpl. August failed to devote his full time, attention, and effort to his duties during the store run on October 11, 2015.

4. The Appellee failed to follow the principles of progressive discipline in this case.

5. Cpl. August 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 or suspended without pay for cause for misconduct, inefficiency, 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) (A) 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) (D) requires, *inter alia*, that DOC employees fulfill the duties of their position to the best of their ability and to devote full time, attention and effort to duties and responsibilities during work hours.

9. Appellee, Department of Corrections, has met its burden to prove, by a preponderance of the evidence, that Appellant violated the above-noted policies by failing to devote his full time, attention, and effort to his duties during the store run on October 11, 2015.

10. Appellee has met its burden to prove, by a preponderance of the evidence, that it gave appropriate pre-termination notice, conducted a pre-termination hearing, and properly notified Appellant of its decision to terminate his employment.

11. Appellee has met its burden to prove, by a preponderance of the evidence that just cause exists for imposing discipline on Appellant.

12. However, Appellee has failed to meet its burden to prove, by a preponderance of evidence, that the discipline imposed in this case – termination – was just and appropriate under the circumstances.

13. The proper discipline to be imposed in this case, as authorized by Merit Rule 455:10-11-14, is a suspension without pay for sixty calendar days.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant is hereby **SUSTAINED IN PART AND DENIED IN PART**, and Appellant's termination is reduced to a sixty calendar day suspension without pay beginning on November 12, 2015.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Appellant is to be restored to his former position and is awarded all back pay and benefits accruing after the completion of the sixty calendar day suspension without pay imposed herein.

DATED this 2nd day of June, 2016.



Matt Hopkins, OBA# 16666
Administrative Law Judge
OKLAHOMA MERIT PROTECTION COMMISSION
3545 N.W. 58th Street, Suite 360
Oklahoma City, OK 73112
(405) 525-9144