BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

CHRISTINA KOVASH,	)	
Appellant,	)	
	)	
v.	)	**Case No. MPC 16-001**
	)	
OKLAHOMA DEPARTMENT OF	)	
HUMAN SERVICES,	)	
Appellee.	)	
	)	

ISSUED
JAN 6 2016
BY
OK MERIT PROTECTION COMM.

FINAL ORDER

This matter came on for hearing on October 20, November 2 and November 9, 2015 before the undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Christina Kovash (hereinafter "Kovash"), appears personally and with her attorney, Daniel Gamino. The Appellee, Department of Human Services, (hereinafter "DHS"), appears by and through counsel, John Douglas, and through Eugene Gissandaner, Table Representative.

Appellant Kovash was a permanent, classified employee of DHS, 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 15 and Protected Exhibit 1 through 11 were offered and admitted into the record. Appellant's Exhibits 1 and 2 were also offered and admitted. No Exhibits were offered that were denied admission. Accordingly, the exhibits presented and admitted are incorporated and made a part of the record. 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

Kovash was a classified employee of DHS, and had been employed as a Child Welfare Specialist III. On August 20, 2014, following the death of an infant that had been the subject of

a previous DHS referral, the DHS Director requested an investigation by the Office of Client Advocacy. This investigation was required to be completed within 45 days. This investigation was not completed for almost 200 days. During that time, the investigator enlarged the scope of the investigation to include three additional "hand-picked" cases and focused upon Kovash. During the 6 months that the investigation was on-going, Kovash was apparently assigned to "special duty", exceeding the 60 day temporary assignment period provided in DHS policy (Joint Exhibit 4, pg. 2). The investigation was concluded and the report submitted on March 6, 2015 (Protected Exhibit 2).

This matter involves allegations of misconduct on four child welfare referrals and one improper access to confidential information. These allegations will be briefly outlined. The referral in July, 2014, was the subject of the original investigation. For that referral, Kovash was acting as a TRU worker, for conducting after-hours Priority 1 referrals. A referral was made from the hospital at the birth of an infant. Kovash went to the hospital and talked with the parents and the siblings. It is alleged that she failed to review the history of the family, failed to obtain the address that the family would be at after discharge from the hospital or the name of the cousin they were staying with, failed to privately interview the siblings, failed to address prior drug usage history and failure to properly document the case. The case was transferred to another case worker, and the referral was approved to be closed due to inability to locate the family. A referral in October, 2013, regards allegations that a mother was abusing illegal substances and thereby endangering her 11 month old child. It is alleged that Kovash falsely documented face-to-face failed attempts on several occasions in that case. Kovash indicates that these were done by telephone, but incorrectly lists them as face-to-face failed attempts. This referral was approved to be closed as unable to locate. The third referral under investigation was in February, 2014 and re-opened in March, 2014. It was alleged that Kovash again falsely documented attempted phone contacts as failed face-to-face attempts. It was also alleged that she failed to properly question the children about drug use in the home. Again, the case was approved for closure due to inability to locate the family. The referral in September, 2013, involved allegations of physical abuse by the father. Kovash is alleged to have failed to do a sufficient background investigation to ensure that a Protective Order was in place and failed to document a safety plan for the children. Finally, it was alleged that an audit trail showed that

Kovash improperly accessed confidential child welfare records while she was detailed to special duty in February, 2015.

Almost two months after the Investigation Report was filed, on May 4, 2015, Kovash was given Notice of Proposed Disciplinary Action – Discharge (Joint Exhibit 1). The notice provided details on the allegations listed above and alleged that Kovash was guilty of violations of OKDHS:2-1-7(i)(1), Unsatisfactory performance; OKDHS:2-1-7(i)(2), Misconduct; OKDHS:2-1-7(i)(2)(A), Unauthorized disclosure of confidential information; OKDHS:2-1-7(i)(2)(B), Willful failure; OKDHS 2-1-7(i)(2)(F), Dishonesty; OKDHS 2-1-7(i)(4), Neglect of duty; OAC 340:75-1-42, Client Information confidentiality; and OAC 340:75-3-200, General protocols for Child Protective Services (CPS) assessments and investigations. Kovash was given copies of the underlying documents giving rise or supporting the proposed action (Protected Exhibit 1). DHS provided a Certificate of Prior Discipline listing the only prior discipline as an oral reprimand in August, 2014 (Joint Exhibit 9). A pre-termination hearing was held on June 3, 2015. Kovash provided a written response to the allegations (Joint Exhibit 2). The Hearing Officer concluded that DHS had met its burden to show that Kovash was guilty of a number of policy violations and that the proven policy violations warranted termination. (Joint Exhibit 10). DHS issued the Notice of Final Formal Discipline on June 17, 2015, discharging Kovash from her position (Joint Exhibit 3). Kovash timely appealed the disciplinary action.

ISSUES

1. Did DHS have just cause to impose discipline for the reasons stated in its Notice of Termination?
2. If so, was the discipline of termination appropriate given the facts and circumstances of this matter?

THE TESTIMONY

During the administrative hearing, the testimony of ten (10) witnesses was taken, with each witness sworn and offered under oath.

The first witness offered by DHS was Luke Cooper, an Investigator in the DHS Office of Client Advocacy (OAC). Cooper testified that an infant died accidentally as a result of being smothered in the parent's bed. It was determined that DHS had previously been contacted at the time of the infant's birth, and that the family had previous referrals in 2008 and 2014. The death of this child was ruled "accidental" and no criminal charges or action was taken. On August 20, 2014, the DHS Director requested OAC to investigate to ensure that DHS acted appropriately regarding the referrals and resulting death. Cooper testified regarding his investigation of this matter. Cooper stated that when the infant was born, a referral was given to Kovash as the TRU worker and she failed to get sufficient information in order to follow-up with the family. There were other concerns noted about this matter and the previous referrals but no one else was disciplined. He also testified that three additional referrals were "hand-picked" by DHS employees Erin Johnson and Robin Cadaret and given to him in mid-September, 2014 to add to his investigation. Cooper provided testimony on his investigation of these three additional referrals. In these cases, Cooper testified that Kovash improperly documented "face-to-face" contacts which did not occur and failed to perform adequate investigations or follow-up contacts. Cooper testified that child welfare work was very stressful and he stated that his understanding of the TRU unit workers was that they were held to the same standards but had a limited function. Cooper admitted that he found that no harm came to any child as a result of Kovash's actions or inactions. He also admitted that all of Kovash's cases were reviewed and closed by supervisors after Kovash worked them.

Eugene Gissandaner, the Table Representative, testified that he is employed by DHS as an Administrative Field Analyst. Gissandaner stated that he was involved in drafting and preparing the Notice of Proposed Disciplinary Action and the Notice of Final Action and that he signed both documents on behalf of Mr. Kelley. He testified that while Kovash was on Detail to Special Duty, she had limitation on her responsibilities and the audit trail indicated that Kovash accessed confidential records on the KIDS data system. He admitted that neither the Detail limitations nor the audit trail were included in the exhibits in this case. He said that Erin Johnson discussed the Detail duties with Kovash. Gissandaner testified that he consulted with Leanne Saunders, the Corrective Discipline Manager, regarding this discipline. He also admitted that the only prior discipline was an oral reprimand and was completely unrelated to this action. Gissandaner acknowledged that some of Kovash's performance reviews seemed to be missing

and that her last PMP was not properly opened and it was not closed until after the OAC Investigation was completed. He also admitted that he didn't review Kovash's PMPs as part of this disciplinary action. Gissandaner also stated that he believed that a Corrective Action Plan had been put into place, however, he admitted that there was no reference to it in any of the disciplinary documents or reports and that it was not part of the record in this matter. Finally, he admitted that there is a state-wide back-log of child welfare cases and there is a huge push to close cases.

Erin Johnson is the District Director for Region 3, which includes Oklahoma County. She acts as Administrator of the field staff. Johnson described the TRU services as a triage response unit formed in June, 2014 to address after-hours Priority 1 referrals. Johnson testified that the protocol for TRU was adopted in November, 2014, over three months after Kovash's TRU response in this matter. The TRU Protocols and/or policies were not part of the Exhibits in this matter. She stated that it was designed only to address immediate safety issues before being transferred to the day shift. Johnson stated that a number of issues were identified in the OAC investigation and that several supervisors and other employees mentioned were counseled but no other disciplinary actions was taken, except for this action regarding Kovash. Johnson stated that she had tried verbal coaching of Kovash but there was no improvement. She acknowledged that there is pressure to reduce the back-log. Johnson stated that she was aware that the PMPs were designed to address performance issues but acknowledged that there were no PMPs for Kovash for 2012 through 2014.

Patricia Valera was a Child Protection Services Supervisor in Oklahoma County, and now works at the CARE Center. She stated that she was familiar with the referral regarding the infant that later died. She said after Kovash received it as the TRU worker, it was transferred to her employee, Steven Glover. She testified that she approved closing the referral because the family could not be located and provided testimony regarding that matter.

Ashley Habel is a Child Welfare Supervisor and she supervised Kovash in July, 2014. She testified that she reviewed Kovash's work on that case and approved its transfer to Steven Glover. She provided testimony of that matter.

Latasha Grenillo has worked at DHS since 2009 and was Kovash's supervisor for a period of time. She testified that she had disputes with Kovash from time to time and felt that Kovash did not do enough to protect the children. She noted that she approved closing one of

the referrals but she included notes about her concerns in the contact screen. Grenillo admitted that she gave a letter of Thanks to Kovash as a way to motivate her employees (Appellant Exhibit 2). Grenillo also admitted that there was a lot of pressure from Erin Johnson not to remove children from homes and to quickly close cases.

Calvin Kelley is the Deputy Director of Child Protection Services for Region 3. He testified that this discharge is consistent with other discipline taken on other employees given Kovash's position and length of service. Kelley stated that he approved of this action and authorized his signature on the Notices. He admitted that he never reviewed Kovash's PMPs and had no idea if they existed or were properly done. He also said that he didn't know about any Corrective Action Plan and had never seen any documentation on that. Kelley testified that he was aware that OCA was required to complete its investigation in 45 days but said he was unaware of any reprimands or disciplines for Cooper taking almost 200 days to complete his report. Kelley also admitted that every report and referral was approved by Kovash's supervisors and that there were no objections or concerns noted. He said the supervisors should have refused to close the cases but none of them did. Kelley stated that none of the supervisors or other employees received any discipline or corrective action. Kelley acknowledged that some of the referrals that this action was based on occurred from 9 months to 21 months before this action. Kelley said in closing that he felt that Kovash was dishonest in her reports. DHS rested its case at that time.

Leslie Reeves is a Child Welfare Specialist in the foster care/kinship area. She testified that she worked with Kovash in July and August of 2014 when the TRU was established. She testified that she was one of the original TRU workers and that initially the objective was to simply assess the safety of the child only until the day shift could take over the case. It wasn't the goal to conduct a full investigation as a TRU worker. She said that there was no written protocol until November, 2014, almost 4 months after the referral in this matter. She testified about the extreme pressure to close cases and that they were consistently under-staffed. Reeves stated that she believed that Kovash was honest and conscientious.

Charlene Reed is an Administrative Technician III at DHS. Reed works in the reception area and does the same job that Kovash performed when she was detailed to special duty. She testified that, as part of her job duties, she accessed the KIDS system when she received calls and

inquiries from law enforcement, medical providers or the District Attorney. Reed said that she had known Kovash for many years and that she was always fair and conscientious.

The final witness was Christina Kovash. Kovash stated that she had worked at DHS for nine and a half years, starting as an Administrative Tech III in reception and receiving promotions to her last position as a Child Welfare Specialist III. In 2012, her supervisor called her an "exceptional employee" with an impeccable work ethic and attention to detail (Appellant's Exhibit 1). She presented several certificates of recognition for her work at DHS (Joint Exhibits 13 & 14). Kovash testified that she usually met twice a year to go over her PMPs – once to open and then to close it out, with an occasional meeting at mid-term to discuss progress. She testified that after leaving the permanency planning area, she was not given a PMP in 2012 or 2013. She said the PMP for 2014 was never opened with her but they closed it in March, 2015. Kovash stated that she filed a grievance against Erin Johnson in September, 2014 and shortly after that, the investigation was expanded to include additional referrals hand-picked by Johnson. She stated that the grievance was never addressed and never resolved. Kovash defended her actions on the July, 2014 referral. She said her role as a TRU worker was to assess the immediate safety of the child and give a preliminary report to the day worker to be assigned to the case. She indicated that she generally discusses the dangers of co-sleeping with new mothers and didn't in this case because it was the fourth baby in the family. She stated that after talking to everyone, she did not note any immediate safety concerns or reason to remove the child from the parents. Both mother and child tested negative for drugs. She said that she had a lengthy discussion about the case with the supervisor on the day shift when it was transferred and no concerns were noted. On the other referrals, Kovash testified that she routinely categorized telephone calls as face-to-face failed attempts and the reports clearly showed that they were by telephone. She was not attempting to hide her actions, mislead anyone or be dishonest in her reports. She had discussed her cases with her supervisors on many occasions and they never indicated that this was an incorrect categorization. Kovash testified that she first became a Child Welfare Specialist in 2012. The KIDS system was new to her at that time. She did not have a supervisor at that time and received very little training on the system and how to categorize contacts. She stated that she simply misunderstood what face-to-face meant.

DISCUSSION

Regarding the allegation that Kovash violated OKDHS:2-1-7(i)(2)(A), Unauthorized disclosure of confidential information, there are glaring absences in the record. DHS failed to provide any evidence or documentation regarding Kovash's Detail to Special Duty to the position of Administrative Technician III and failed to provide any documentation of any limitations that they placed upon Kovash during that time. There was no presentation or discussion of the job duties of this Detail position. This is an especially critical omission given that Ms. Reed testified that she routinely accessed the system as part of her duties in the same position. As a result, DHS has failed to meet its burden of proof regarding this alleged violation.

Regarding the allegations of violations related to the July, 2014 referral, there is conflicting evidence of the role and responsibility of the TRU workers. It is agreed that they were in a specialized role dealing with urgent, after-hours cases. The written protocol wasn't issued until several months after this incident. It is also unknown what that protocol provided as it was not made part of the record. In hind-sight, if Kovash had properly reviewed the history of the case, she would have known about the family's prior lack of cooperation. Unfortunately, without an opportunity to review the protocol, it is unknown if the TRU worker was required to complete a full history and criminal record review prior to the first meeting with the family. It is also unknown if the TRU protocol mirrors the Instructions to Staff on policy 340:75-3-200, which clearly provides for a different standard for after-hours referrals (Joint Exhibit 7, pg. 4, para. 4.,(1)(B)) DHS took disciplinary action against Kovash for not following the regular protocol. For example, DHS incorrectly stated that contact with the children must be conducted in private, when at least two witnesses testified that that language was a "misquote". Finally, very little effort was made by the day staff to investigate after this matter was transferred to them, with no consequence occurring. On the other referrals that were "hand-picked" for review, it is clear that errors were made in documenting the contacts. From the totality of the evidence, however, these errors appear to have been a result of ignorance or lack of training. Kovash testified that she had been in this position for about 2 years prior to this disciplinary action. During this critical time, her reports were routinely reviewed and approved by various supervisors. Furthermore, no PMPs were performed. Kovash testified that she received little guidance or training on KIDS and had to just learn as she went. There was also conflicting

testimony that a Corrective Action Plan was put into place, however, it was never produced and it is unknown what issues it was designed to address.

The lack of PMPs is disturbing. Even more disturbing is the fact that Kovash had filed a grievance against at Johnson, and shortly thereafter, Johnson "hand-picked" these additional referrals for investigation. It is unknown what the grievance dealt with, because there is no documentation in the record. It is also disturbing that the grievance was apparently never addressed or resolved. These two may be entirely unrelated but it certainly gives the appearance of retaliation. This is especially true given that the OAC Investigative Report was critical of other DHS workers, however, not a single other person was disciplined as a result of the report.

The preponderance of the evidence fails to support the allegation of neglect of duty in that DHS has failed to provide evidence that Kovash "inexcusably" failed to perform or pay attention to her assigned duties. (See Joint Exhibit 4, OKDHS 2-1-7(i)(4), Neglect of duty). The preponderance of the evidence fails to support the allegation of dishonesty in that DHS has failed to provide evidence that Kovash committed fraud or made false entries to misrepresent work performed (See Joint Exhibit 4, OKDHS 2-1-7(i)(2)(F), Dishonesty). The evidence shows that she made erroneous entries but it was clear from the corresponding information she included that the contacts were by telephone. Further, her testimony that it was a mistake from lack of training supports this position. This is exacerbated by the lack of proper review by her supervisors and the failure to conduct performance evaluations. The preponderance of the evidence fails to support the allegation of willful failure in that DHS has failed to provide evidence that Kovash willfully or intentionally failed to follow policy (See Joint Exhibit 4, OKDHS:2-1-7(i)(2)(B), Willful failure). The preponderance of the evidence fails to support the allegation of failure to follow the general protocols for CPS investigations related to the July referral in that DHS has failed to provide evidence of the TRU protocols as well as misquoting the provisions of that policy (See Joint Exhibit 4, OAC 340:75-3-200, General protocols for Child Protective Services (CPS) assessments and investigations). Given that DHS has failed to meet its burden on the above allegations, the preponderance of the evidence fails to support the allegation of misconduct (See Joint Exhibit 4, OKDHS:2-1-7(i)(2), Misconduct).

The remaining basis for this disciplinary action is OKDHS:2-1-7(i)(1), Unsatisfactory performance. The evidence supports that Kovash did commit numerous errors in the performance of her duties with regard to these referrals. Although not rising to the level of

intentional misconduct, she did mislabel her contact attempts and she was not as thorough as she should have been in her investigations. DHS has met its burden of proof on this allegation. However, Kovash's lack of proper training and lack of meaningful supervision and performance reviews mitigate the allegations. Given that DHS failed to meet its burden on all other allegations, it is impossible to determine that the discipline of discharge was appropriate and just under the circumstances. Evidence was presented that Kovash was a good employee and had received positive ratings in prior years.

The only allegation in this case that was found to be supported by the evidence is unsatisfactory performance. DHS policy provides that this is, in most circumstances, correctable and disciplinary action should normally be preceded by efforts to correct the performance problems (See Joint Exhibit 4, OKDHS: 2-1-7(i) (1)). There is no evidence in the record that efforts were made to help Kovash correct the performance problem. This appears to be a performance related problem and should be addressed accordingly, in accordance with the principals of progressive discipline. There simply is no justification for jumping all other levels of discipline to impose the most severe level. Given Kovash's lack of understanding and thoroughness in conducting investigations, the evidence supports that demoting one level is more appropriate as progressive discipline. Kovash is qualified for Child Welfare Specialist II and it is more in keeping with DHS policy of correcting performance problems. It recognizes her shortcomings in performing full-time her duties, while not unjustly penalizing her.

The undersigned has considered all of the facts and circumstances of this case and the testimony of the witnesses. DHS has met its burden that one allegation is proven however, progressive discipline mandates that a lesser form of discipline is warranted. Mitigation is warranted under the facts and circumstances of this matter as discussed herein. Given the totality of the circumstances, a reduction of the discipline to a demotion to Child Welfare Specialist II is appropriate.

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 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 an employee in the classified service may be involuntarily demoted for misconduct and/or just cause.

5. The preponderance of the evidence supports DHS' allegation of unsatisfactory performance by Kovash as noted in the Notice of Disciplinary Action. The preponderance of the evidence does not support DHS' allegations of Misconduct; Unauthorized disclosure of confidential information; Willful failure; Dishonesty; Neglect of duty; or violations of Client Information Confidentiality or General protocols for Child Protective Services (CPS) assessments and investigations.

6. Appellee DHS has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Kovash for her unsatisfactory performance and her appeal on that ground is denied.

5. Appellee DHS has failed to meet its burden to prove, by a preponderance of the evidence, that the discipline of discharge was just and appropriate under the circumstances and consistent with progressive discipline, Merit rules and laws. As a result, the discipline imposed is unduly harsh and unfair given the totality of the evidence.

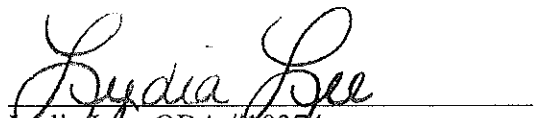
6. In accordance with OAC 455:10-9-2 (f) (1) (C), upon the finding that just cause existed for the adverse action, but did not justify the severity of the discipline imposed, the undersigned is ordering a reduction of the discipline. In ordering the reduction of discipline, the undersigned considered, at a minimum, the seriousness of the conduct as it relates to Kovash's duties and responsibilities; the consistency (or inconsistency) of action taken by DHS with respect to similar conduct by other employees; the previous employment and disciplinary records of Kovash; and other mitigating circumstances as discussed herein above.

7. The record herein supports imposition of formal discipline in the form of an involuntary demotion to a Child Welfare Specialist II as just and appropriate considering all of the facts and circumstances.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant, Christina Kovash, MPC 16-001 is DENIED IN PART and SUSTAINED IN PART. The discipline imposed upon Appellant is reduced to an involuntary demotion to a Child Welfare Specialist II consistent with this Order. Appellant is to receive back pay and benefits and Appellant's personnel records are to be expunged consistent with this Order.

This Order entered this 4th day of January, 2016.



Lydia Lee, OBA #10374
Administrative Law Judge