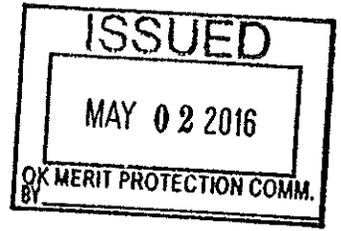


OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA



BRUCE W. KEITEL,)
 APPELLANT,)
))
 v.))
))
DEPARTMENT OF CORRECTIONS,)
 APPELLEE.)

CASE NO. MPC 16-031

FINAL ORDER

This matter came on for hearing on April 19, 2016, before the assigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission in Oklahoma City, Oklahoma. Appellant, Bruce W. Keitel, appeared in person and through his counsel, Matthew Frisby, of counsel with Gary J. James & Associates, P.C. Appellee, the Department of Corrections (hereinafter "DOC") appeared through Michele Miniotta, its Assistant General Counsel, and agency representative Warden Janice Melton, Warden of the Charles E. "Bill" Johnson Correctional Facility in Alva, Oklahoma (hereinafter "BJCF").

Appellant is a permanent, classified employee of Appellee, appealing from an adverse disciplinary action consisting of a five-day suspension without pay pursuant to Merit Rules 455:10-11-14 and 15. This discipline was imposed upon Appellee for failing to "devote full time, attention, and effort to the duties and responsibilities of [his] position[] during assigned hours of duty (Merit Rule 530:10-11-91(d))."

While Appellant was assigned to Central Control, the hub of the facility, he diverted his attention from his assigned post and picked up two weapons at the same time. He hit the slide releases so that the slides closed, then pulled the triggers on both weapons causing one of the weapons to discharge. Two other officers were in the room with him. Appellant admits he took the actions resulting in the discipline. However, he argues the discipline imposed upon him was inconsistent with discipline imposed upon other DOC employees in similar

incidents and contends Warden Melton failed to consider all mitigating factors before imposing the suspension, thus violating Merit Rules and DOC policies relating to discipline.

The undersigned opened the record and convened the hearing, during which the undersigned heard the sworn testimony of witnesses for both Appellant and Appellee, viewed the exhibits admitted into evidence, and heard arguments from counsel. Six witnesses testified and exhibits were introduced. The undersigned admitted into evidence Joint Exhibits 1-23 and Hearing Exhibit 24, to which neither party objected. Counsel for the parties presented their closing arguments, whereupon the record was closed.

After careful consideration of all evidence, testimony and exhibits, the undersigned Administrative Law Judge issues the following Findings of Fact, Conclusions of Law, and Order pursuant to Okla. Stat. tit. 74, § 840-6.7(B).

FINDINGS OF FACT

Background of the Case

Until shortly before the hearing, Appellant served as a Correctional Security Officer IV at BJCF, where he had been employed in various capacities for the past 20 years and seven months.¹ A review of Appellant's PMPs since 2012 revealed he consistently met standards in the performance of his job duties. Appellant has no record of prior formal or informal disciplinary actions.

The Testimony

The testimony of six witnesses, properly sworn and placed under oath, was taken and made a part of the record.

A. Sergeant Stanley Klutz. Sgt. Klutz has been employed at the John H. Lilley Correctional Center in Boley, Oklahoma since 1987. He is currently in charge of the armory and has served as a CLEET certified firearms instructor since 1991. While he did not train Appellant, he testified generally about the

¹ Shortly before the hearing, Appellant voluntarily transferred to the James Crabtree Correctional Facility where he remains employed in the same capacity.

scope of the training and specifically about certain aspects of the training that are emphasized.

The DOC requires all corrections officer cadets/new hires whose duties require the use of firearms to complete a 40-hour firearms training program and to demonstrate proficiency by achieving certain scores on the qualification courses before completing their probationary period. Corrections officers also must re-qualify every year, thus demonstrating continuing proficiency. Sgt. Klutz testified safety is the number one priority for all participants in the firearms training; safety is emphasized during the initial qualification and during every subsequent yearly re-qualification training.

The training materials encompass semi-automatic pistols such as the Glock 17 at issue herein, and provide instructions for ensuring the pistol is unloaded. Sgt. Klutz succinctly summarized those instructions:

1. Remove the magazine;
2. Pull the slide to the rear and eject anything in the chamber (live cartridge);
3. Lock the slide back;
4. Visually check to be sure the gun is unloaded.

He added that failing to remove the magazine first could result in the reloading of the chamber.

After completing the above steps, the officer is to point the weapon into a clearing barrel and dry-fire it, which requires closing the slide then pulling the trigger without rounds or a magazine in the pistol. Firearms training participants are instructed to always assume a weapon is loaded, and to never point a firearm at anything unless they are ready to destroy that object.

During Sgt. Klutz's tenure as a firearms instructor he has been involved in two instances of accidental discharges, both involving trainees. He acknowledged there have been a number of accidental discharges throughout DOC since 1991 – "it happens." He had no personal knowledge of the incident involving Appellant.

B. Sergeant Jeff Graybill. Sgt. Graybill is a Corrections Officer who has been employed at BJCF for just over nine years. He completed the initial firearms qualifications course and has re-qualified every year. He acknowledged the annual re-qualification always covers safety and 75% of the questions on the yearly test relate to safety. On August 11, 2015, he and Cpl. Stephen Fox were assigned to transport three offenders from BJCF to the Lindsey Hospital, then back to the facility. Because one of the offenders was classified as a high security risk, this necessitated an armed transport, thus Sgt. Graybill had checked out two Glock 17 pistols.

As the transport vehicle neared the facility on the return leg of the transport, the officers called Appellant to ensure all designated areas were cleared of inmates so no one would be in the area where an officer had a weapon. Once the officers received notice the areas were clear, they unloaded their weapons inside the vehicle. Sgt. Graybill admitted he followed the steps out of order when unloading his weapon on this day – he pulled the slide back first then removed the magazine. He acknowledged that failing to remove the magazine before pulling the slide back made it possible for another round to be chambered.

Sgt. Graybill then carried both weapons and four magazines inside the building and placed them on a table in Central Control without stopping outside the building to dry-fire the weapons into the clearing barrel. He testified that at this point, the weapons posed no danger to anyone. Appellant was posted to Central Control at that time where he was responsible for manning the radio, answering the phones, monitoring the cameras and inmate counts, and keeping the facility on schedule.

Sgt. Graybill returned to the vehicle whereupon he and Cpl. Fox returned the offenders to their respective cells and collected the restraints. He intended to take the restraints and retrieve the weapons from Central Control then put them away and sign them back in. However, when he got to Central Control the

weapons were not where he left them. Lt. Scribner informed him one of the weapons had been discharged and he needed to complete an incident report.

Sgt. Graybill received a Formal Letter of Reprimand for his actions on this day. He did not remember the basis of the Letter of Reprimand. In conjunction with his Letter of Reprimand he was required to review the weapon safety loading and unloading procedure with a firearms safety instructor.

C. Corporal Chad Collins. Cpl. Collins is a Correctional Officer who has been employed at BJCF for a year and a half. On August 11, 2015, he was standing in Central Control reviewing his Performance Management Process ("PMP") with Lt. Scribner when he saw Sgt. Keitel grab both weapons from the table, heard the buttons on the guns and heard the slides drop, then heard a loud boom. Sgt. Keitel was on the opposite side of the room from him facing south when the gun discharged. Cpl. Collins stated he was shell-shocked.

Cpl. Collins had previously been posted to Central Control where he described the post as "War Room Chief" because the officer posted there is responsible for that room and the entire facility. He had also previously done an armed transport, and described the procedure for that. It was his practice to stop and dry-fire the weapon into the clearing barrel before taking the weapon to Central Control, to re-check it by putting his finger in the barrel, then to show the officer in Central Control that the weapon was clear before putting it down. According to Cpl. Collins, Central Control is a bullet-proof room and is supposed to be the most secure room in the facility.

D. Sergeant Toby Kiryakakis. Sgt. Kiryakakis has been employed by DOC just short of five years has been in charge of the armory at BJCF since. The armory is a set-aside area accessible only by him, the warden, deputy warden, chief security officer, safety officer, and emergency response team (CERT team). He is responsible for the upkeep and maintenance of all weapons – he annually recertifies each weapon, inventories the weapons and rounds used, and keeps track of weapons checked out for armed transports. The officer who checks out a weapon for an armed transport is responsible for signing the

weapon back in and must count and account for all rounds, magazines, and other related equipment.

Across the hall from the armory is the CERT room where emergency response equipment is kept and where training classes clean weapons. While the same safety standards apply in the CERT room as in Central Control, because Central Control is a duty station and the hub of the facility it mandates more stringent safety standards than in the CERT room that is more of a training environment. He cleans weapons in the armory; training classes clean weapons in the CERT room.

On August 11, 2015, Sgt. Kiryakakis was on duty in his office directly across from Central Control. While he did not witness the incident, he heard the discharge then went to the window of Central Control and saw Appellant, Lt. Scribner and Cpl. Collins all in a dazed state. When the door was opened he smelled powder. He checked for danger and determined there was none, so walked in. Appellant was confused and dazed and was holding two weapons, one in each hand. Sgt. Kiryakakis took the weapons from Appellant and checked them, one at a time. The first weapon was clear, but when he pulled the slide on the second weapon a casing came out. He determined Appellant was not hurt and relieved him of his post.

Sgt. Kiryakakis was tasked to investigate the incident. He traced the weapons and looked for malfunction and error in the unloading processes. He was able to recreate the incident with dummy rounds and concluded there was no malfunction. Sgt. Kiryakakis also eliminated accidental discharge as a factor because this weapon will not accidentally discharge without the trigger being pulled. Rather he determined Sgt. Graybill made a mistake by failing to remove the magazine before pulling the slide back. With the magazine in place, when Sgt. Graybill pulled the slide back and ejected the live round it took just a small amount of forward motion to chamber another round.

He testified the officers are supposed to dry-fire into the clearing barrel to confirm the weapon is unloaded, but when he was hired as armor the clearing

barrels were not routinely used. Nonetheless, there would be no reason to dry-fire a weapon in Central Control.

E. Appellant – Sgt. Bruce Kettel. Appellant has been employed by the DOC for twenty years and seven months. He began at the BJCF and recently voluntarily transferred to another facility. On August 11, 2015, while he was posted in Central Control the armed transport officers called to let him know they had returned. After he informed them it was clear, Sgt. Graybill brought both weapons inside and laid them on the counter behind him. The slides were back and the magazines were laid separately on the counter. Sgt. Graybill left to offload the inmates.

As the Central Control officer, Appellant was in charge of the facility. He had frequently manned this post and was familiar with the duties. He also had been assigned to armed transports so was familiar with those procedures.

There were two other officers in the room with him while the weapons were on the counter. He stated he did not consider the weapons secure, so thought he would be helpful and move them to one of the fold-out boxes under the window. He observed both weapons and saw the ejection ports were down (right-side down), the slides were back, and the magazines were out. He then picked up both weapons, hit the slide releases, the slides closed, he faced the security box under the window, checked the numbers, then engaged the firing mechanisms, and one of the weapons discharged. At that point he froze with both weapons in his hands. Lt. Scribner asked if anyone was hurt. Sgt. Kiryakakis came to the door and was allowed in, took the weapons from him and relieved him from duty. Appellant admitted he made a mistake by not physically or visually checking the weapons to see if they were loaded.

Within hours of the incident he went through debriefing with the warden, deputy warden, chief of security, and the two transport officers. On August 27, 2015, he received a Notice of Proposed Suspension Without Pay and Opportunity to Respond. He responded that he believed the suspension was excessive and that not all factors were considered, such as his previous

questioning of armed transport policies and failure to use clearing barrels. He also thought the fatigue factor resulting from working nine straight days (at his request for an extra day off for a family birthday) and this incident occurring near the end of his last shift should have been considered. Another concern for him was the prospect of being placed on secondary payroll at a time he was trying to qualify for a home mortgage loan. He also questioned whether the proposed discipline was commensurate with discipline imposed in what he considered to be similar incidents.

On September 4, 2015, Appellant received notice he was being suspended without pay for five days for his part in the incident. Warden Melton noted she had considered his written response before imposing this discipline. The suspension was imposed under Merit Rules 455:10-11-14 and 15 which provide that a permanent classified employee may be suspended without pay for failing to "fulfill, to the best of their abilities, the duties of their position (Merit Rule 530:10-11-91(a)) and devote full time, attention, and effort to the duties and responsibilities of their positions during assigned hours of duty (Merit Rule 530:10-11-91(d)) (Oklahoma Constitution, Art. II, Section 11)."

The Notice of Suspension also cited provisions from the Firearms Qualifications Standards (100203) and the Firearms Safety Lesson Plan regarding 1) the requirement to demonstrate continuing proficiency relating to the use of firearms, which both parties agreed Appellant had done; and 2) the admonition that the number one priority is safety and the safety rules that provide an officer is to always assume a firearm is loaded, is to always first ensure a firearm is unloaded when picking it up, and is to never take anyone's word a firearm is unloaded but is to always check it himself. The parties agreed that the Notice of Suspension was not premised upon a violation of a rule regarding the safety training - Appellant had fulfilled the requirements for continuing proficiency. Rather the Notice of Suspension contained that language because the observation of the firearms safety rules is a fundamental part of the officers'

training and an overarching expectation in the performance of their day-to-day responsibilities.

Appellant acknowledged he violated policy by assuming the weapons were unloaded, by failing to physically and visually inspect them, and that he dry-fired them in Central Control, the most secure room in the facility. He did not explain why he picked up both weapons at the same time.

He testified he had no prior discipline and had fairly good PMPs since 2012.

F. Warden Janice Melton. Warden Melton has been employed by DOC for 38 years. For the past 20 years she has served as Warden of BJCF. She is responsible for every aspect of the operation of BJCF, which primarily houses drug offenders.

She has worked with Appellant at BJCF for most of her time there as Warden. She noted Appellant voluntarily transferred to another correctional facility two weeks prior to the hearing.

Warden Melton did not witness the August 11, 2015 incident, but heard of it from the deputy warden and chief of security. She immediately verified the safety of all officers in Central Control and, in accordance with standard procedure, removed Appellant from his post.

Thereafter, Warden Melton conducted a thorough review of the incident. She noted it was rare for her to impose discipline or to issue suspensions, and testified at length about the process she employed to determine the appropriate discipline for Appellant. She reviewed all of the incident reports and interviewed everyone involved in the incident. As a part of her review, she determined Sgt. Graybill had failed to follow proper procedures for signing out weapons and for properly clearing weapons and issued a Formal Letter of Reprimand to him.

She reviewed other incidents involving accidental discharges at BJCF and DOC-wide and compared the circumstances of those incidents with the circumstances involving Appellant. Incidents in which informal discipline or lower levels of formal discipline were imposed were distinguished. For instance, those

incidents occurred on the training range or in the CERT room – areas designated for training or clearing and cleaning weapons (training stations v. duty stations). Those incidents involved *accidental* discharges, not intentional pulling of the trigger, the discharges were toward the floor, and either those present knew weapons were being handled and cleaned or there were no other people present.

She also reviewed and distinguished two incidents meriting suspensions without pay. An officer whose weapon discharged when in his pocket instead of his holster received a one-day suspension for unsafe handling. A probation and parole officer who removed his weapon from his holster and discharged it in an office with others present received a two-day suspension. While the second situation most closely paralleled the incident at bar, she deemed the seriousness of Appellant's actions well beyond that one.

She stated everything about the incident in which Appellant was involved alarmed her. Appellant was the officer in charge in Central Control, the hub of the facility, thus was responsible for managing the most critical operations of the facility in what is supposed to be the most secure room in the facility. His duties did not include clearing weapons. Rather, his presence insured that the weapons were attended until the officers responsible for them retrieved them and signed them back in.

She was concerned that Appellant turned from his job duties and picked up two weapons at the same time, since there is no safe way to pick up two weapons at the same time, much less properly check them to see if they are loaded or to safely use them. Then while holding both weapons, he released the slides and pulled the triggers on both weapons. By doing so he blatantly disregarded all of his firearms training: he failed to assume the weapons were loaded, he failed to check to insure they were unloaded, he failed to prioritize safety, and he disregarded all precepts of safe handling of weapons. His actions created an incredibly dangerous situation for two other officers in an ostensibly secured area. Warden Melton could not recall an officer ever picking up two weapons at the same time, much less doing so in Central Control where the most

critical operations of the facility occur. That an officer with Appellant's experience would do this surprised her.

As a part of her analysis, Warden Melton considered mistakes made by other officers involved in this incident, but determined those mistakes did not relieve Appellant of the responsibility for the discharge. She also considered Appellant's request for mitigation because he had worked one 8-hour shift and eight twelve-hour shifts in a row without any days off. She reviewed Appellant's PMPs and noted his performance had met expectations for the past four years. She factored in Appellant's lack of prior discipline within the preceding four years. Finally, she seriously considered the financial hardship Appellant would suffer and did not take that lightly. Her final decision, however, rested on Appellant's blatant disregard for his job responsibilities, his recklessness, his failure to follow any safety practices, and his endangerment of two fellow officers. While she fully appreciated and regretted the hardship to Appellant, she believed any lesser discipline would belie the seriousness of Appellant's actions.

Discussion

Because this is an adverse action, DOC has the burden of proving there is just cause to impose discipline, and that the discipline imposed was appropriate. In this case, DOC imposed a five-day suspension without pay. This discipline was imposed upon Appellant for diverting his attention from his assigned post at Central Control, the hub of the facility. He turned away from his job duties as "War Chief" of the facility, picked up two weapons at the same time, hit the slide releases so that the slides closed, then dry-fired both weapons causing one of the weapons to discharge. Two other officers were in the room with him.

Merit Rules provide that a permanent classified employee may be suspended without pay for cause, including failure to "fulfill, to the best of [his] abilities, the duties of [his] position (Merit Rule 530:10-11-91(a))" and failure to "devote full time, attention, and effort to the duties and responsibilities of [his] position[] during assigned hours of duty (Merit Rule 530:10-11-91(d))."

The testimony established that Central Control, Appellant's assigned post on the date the incident occurred, requires a high level of responsibility and attention. This post is the hub of the facility, thus the assigned officer is responsible for managing the most critical operations of the facility. These responsibilities include manning the radio, answering the phones, monitoring the cameras and inmate counts, and keeping the facility on schedule. These duties do not require the use of firearms or the clearing of firearms.

The testimony also established that firearms safety is a top priority at the facility. Newly hired officers must complete and pass a forty-hour firearms training course; thereafter every officer must complete an annual re-qualification course and obtain certain minimum scores. Officers receive detailed instructions on, among other things, loading and unloading weapons. They are further instructed to always assume a weapon is loaded, and are cautioned to never point a firearm at anything unless they are prepared to destroy that object.

Appellant admits that despite the high level of responsibility he had while posted to Central Control, he walked over to the table where the two weapons were laying in a safe state, with the magazines out and the slides locked back. He picked up two weapons at the same time, neither of which was his responsibility. The testimony established there is no safe way to pick up two weapons at the same time and properly check both to see if they are loaded, nor is there any way to safely use both at the same time. Nonetheless, while holding both weapons, he released the slides and pulled the triggers on both weapons causing one to discharge. This evidenced a blatant disregard for all of his firearms training: he failed to assume the weapons were loaded, he failed to check to insure they were unloaded, he failed to prioritize safety, and he disregarded all precepts of safe handling of weapons. His actions created an incredibly dangerous situation for two other officers in an ostensibly secured area. As Warden Melton testified, she could not recall an officer ever picking up two weapons at the same time, much less doing so in Central Control where the most critical operations of the facility occur and where the assigned officer must

be attentive and responsible. She was surprised someone with Sgt. Keitel's experience would do something like this.

While Appellant argues Warden Melton failed to consider any of his arguments that may have mitigated the discipline, it was obvious from her demeanor and testimony that she devoted a great deal of thought, consideration, deliberation, and analysis to examining the facts of this incident, distinguishing them from prior discharge incidents and the discipline imposed therein, and arriving at what she deemed to be appropriate discipline under all the circumstances. She also seriously considered all of Appellant's other arguments before determining the discipline was warranted.

Therefore, Appellee established by a preponderance of the evidence that Appellant failed to devote full time, attention and effort to his assigned duties.

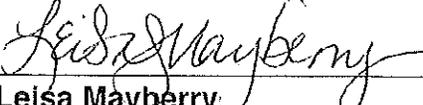
CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the subject matter in this case.
2. Any finding of fact that is more properly a conclusion of law is hereby incorporated as a conclusion of law.
3. DOC has the burden of proof to establish by a preponderance of the evidence that just cause existed for the adverse action and that the discipline imposed was appropriate. OAC 455:10-9-2.
4. DOC is responsible for establishing a written system of progressive discipline with to ensure that any discipline imposed is consistent, impartial, and predictable. Penalties can range from verbal warning to discharge, and include intermediate levels of a written warning, suspension, or demotion. While discipline typically is imposed in a progressive manner, where the circumstances warrant "a single incident may justify a higher step of discipline without proceeding through lower steps of discipline." 74 O.S. § 840-6.3; OAC 455:10-11-4-455:10-11-11.

5. DOC may discipline a classified employee by imposing a suspension without pay for up to 60 days for, among other things, willful violation of the Merit Rules. OAC 455:10-11-14.
6. The Merit Rules require employees to “fulfill, to the best of their abilities, the duties of their position (Merit Rule 530:10-11-91(a)) and devote full time, attention, and effort to the duties and responsibilities of their positions during assigned hours of duty.” Merit Rule 530:10-11-91(d); Oklahoma Constitution, Art. II, Section 11.
7. Prior to imposing a suspension without pay, the employee must receive notice of the proposed action, which shall include the reasons for the proposed action and the rule, policy, or other standard violated. The employee must be given an opportunity to respond before the suspension is imposed. Neither the Personnel Act nor the Merit Rules require a hearing prior to imposing a suspension without pay. 74 O.S. § 840-6.4; OAC 455:10-11-15.
8. DOC established, by a preponderance of the evidence, that the discipline imposed on Appellant was just.
9. DOC established that the relevant circumstances of the incident involving Appellant justified imposing a higher level of discipline without progressively proceeding through the lower levels of discipline.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that DOC’s imposition of a five-day suspension upon Appellant was just, and Appellant’s appeal is not sustained.

Signed this 29th day of April, 2016.



Leisa Mayberry
Administrative Law Judge
Oklahoma Merit Protection Commission
3545 N.W. 58th Street
Oklahoma City, OK 73112