

BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

FONDA L. BROUSSEAU,)	
)	
Appellant,)	
)	
v.)	Case No. MPC-14-181
)	
OKLAHOMA DEPARTMENT OF)	
TRANSPORTATION,)	
)	
Appellee.)	

FINAL ORDER

The hearing on this matter was held before the undersigned duly appointed Administrative Law Judge on September 16, October 13, and November 23, 2015, at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant, Fonda L. Brousseau (“hereinafter referred to as “Appellant”), was represented by Daniel J. Gamino, Esq. Appellee, Oklahoma Department of Transportation (hereinafter referred to as "ODOT" or "Appellee"), appeared by and through Tamar Graham Scott, Deputy General Counsel, and table representative Shannon Sheffert, Local Government Division Engineer, for ODOT.

Appellant, was a 19 year classified employee of ODOT, discharged from her position as an Administrative Programs Officer II on April 25, 2014 for misconduct, insubordination and conduct unbecoming a public employee. Appellant had previously received verbal and written reprimands on two different occasions and a ten-day suspension without pay. Appellant denied that she had engaged in conduct constituting misconduct, insubordination or conduct

unbecoming a public employee. Appellant also asserted as affirmative defenses that ODOT had failed to administer progressive discipline correctly, that she had been unlawfully retaliated against for previously filing a grievance against Shannon Sheffert, her supervisor, resulting in mediation in 2012 to resolve the failure of Shannon Sheffert to complete the Performance Management Process (“PMP” or “performance evaluations”) for her for the years 2007 to 2012, and that her discharge for filing the grievance and seeking mediation constituted a violation of the Whistleblower Act, 74 O.S. §840-2.5. ODOT denied Appellant’s allegations, and further stated that it applied progressive discipline to Appellant in accordance with Oklahoma law, including the discharge of Appellant for cause.

Whereupon, the sworn testimony of witnesses and exhibits for both Appellee and Appellant were presented. The following exhibits are incorporated herein and made a part of the record in this proceeding: Appellee’s Exhibits 2, 3, 4, 5, 6, 7 (as proof of prior discipline only), 10, 12, 13, 14, 15, 16, 17, 23, 24, 25, 27, 28, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43 and 44; and Appellant's Exhibits A, B, D, E, G, H, J, K, L, M, and N. Accordingly, after careful consideration of all evidence, testimony, exhibits, and written submissions, the undersigned Administrative Law Judge issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Prior to working for the State of Oklahoma, Appellant served 17 years in the U.S. Navy and received an honorable discharge. Appellant had been a classified employee with the State of Oklahoma since 1995, and had been employed at the ODOT from 1999 until April 25, 2014. Undisputed testimony of Appellant. At the time of her discharge,

Appellant was an Administrative Programs Officer II in the Local Government Division of ODOT. Appellant's Exh. A, Petition for Appeal and Notice of Discharge; Appellee's Exh. 39, Notice of Discharge; testimony of Appellant.

2. The Notice of Discharge included a two-page attachment entitled Specifics of Cause setting forth the grounds for Appellant's discharge. Appellant's Exh. A, pp. 4, 5; Appellee's Exh. 39, pp. 2, 3. The first paragraph of the Specifics of Cause stated that Appellant's continued disruptions to the Local Government Division required formal disciplinary action against Appellant, that Appellant created an inefficient and unpleasant workplace by causing conflict and discord among employees of the Division by raising her voice, accusing others of wrongdoing and handling disagreements unprofessionally, and treating members of the public disrespectfully and unprofessionally. The remaining paragraphs included the following specific allegations against Appellant (designations of subparagraphs a, b, c, etc. were not used in the Specifics of Cause, but have been added for reference within this Order by the undersigned):

- a. "On January 28, 2014, you verbally attacked a co-worker regarding the phone upgrade project and the ordering chairs that had been assigned to this employee. You aggressively told this co-worker that it was not his job to put together a chair order and then you marched to Mark Scott's office and proceeded to slam his door after you entered the office. You also informed this employee that a co-worker had filled out his A-9 form incorrectly and stated that it was your responsibility to keep up with his

time worked. This co-worker stated that you told him that you come back to his work area to see if they 'are still at work'".

Chad Meisenburg, Administrative Programs Officer, Local Government Division of ODOT, testified that on January 28, 2014, after coming into his office, Appellant became argumentative over Mr. Meisenburg being assigned the phone system upgrade and chair purchase projects, the failure of a co-worker to complete an A-9 form correctly. Appellant insisted that she was responsible for checking on Mr. Meisenburg and two other employees to be sure their work time was accurately reported. After being asked several times to discuss these issues with Mark Scott and Shannon Sheffert and leave him alone, Appellant left and went to Mark Scott's office. Mr. Meisenburg's testimony was consistent with the Specific Cause above and his written statement (Appellee's Exh. 24) as it related to Appellant arguing with Mr. Meisenburg and her not leaving his office until he had asked Appellant to leave several times. In Mr. Meisenburg's testimony, he stated that he felt threatened by Appellant's behavior in his office. However, his written statement (Appellee's Exh. 24) does not include that he felt threatened by Appellant. Appellant described this event as a discussion and asserted that she discussed this matter with Mr. Meisenburg because the phone system was included in her duties.

- b. "On February 4, 2014, Mr. Scott attempted to speak to you regarding a telephone issue and you kept interrupting him to state that you did not need the extra phone modules on your work telephone and their associated high cost. Mr. Scott became so exasperated that he was unable to address this phone issue without your interruption that he finally asked you to leave his office."

Mark Scott, Local Government Assistant Division Engineer, testified that Appellant came into his office on February 4, 2014 to deliver mail, and while Appellant was there, Mr. Scott attempted to inform Appellant that the main phone had not not ringing. Because Appellant had not noticed the phone problem, he had received assistance from Kim Bleeker, who had the phone malfunction corrected. Mr. Scott testified that he was going to tell Appellant that the phone problem was fixed and that he needed her to set up the voice mail and retrieve any phone messages, but as soon as he mentioned the phones Appellant interrupted him to "rant" about the extra phone modules on her desk and the unnecessary costs the agency was incurring. Appellee's Exh. 25. Mr. Scott further testified that Appellant would continue to interrupt each time he would try to give her instructions about setting up the voice messaging system, and that finally, he gave up trying to discuss the voice messaging system and told Appellant to leave his office. Appellant asserted that she was only trying

to explain that others had been involved in ordering the phone modules and that Mr. Scott did not tell her to leave his office.

- c. "On March 13, 2014, you were overheard by several employees where you answered what appeared to be a wrong number phone call in an unprofessional and abusive manner. You were overheard telling the individual to not to hang up and 'we don't do that.... rather we build roads and bridges.' The tone and manner of the conversation was very unprofessional and condescending."

Roger Chambers, Administrative Programs Officer, Local Government Division of ODOT, testified that on March 13, 2014 he overheard Appellant answer a phone call that appeared to be a "wrong number." Mr. Chambers' further testified that Appellant's tone of voice was rude and it was Appellant's tone of voice and manner in speaking to the caller that is what caught his attention. Shannon Sheffert, Appellant's supervisor, was aware of this phone call and requested Mr. Chambers to submit a written statement about the incident, which was admitted into evidence as Appellee's Exh. 28.

Terri Wade, Administrative Programs Officer, Local Government Division, ODOT, testified that she overheard Appellant speaking in an unprofessional manner to someone on the phone on March 13, 2014. Ms. Wade sent an email to Shannon Sheffert, Appellant's supervisor, regarding this phone call. Ms. Wade also testified that after Appellant

speaks with her son she is often upset and subsequently has been abrupt or rude to people on the phone. A copy of the email was admitted into the record as Appellee's Exh. 30. Ms. Wade also testified that Appellant answered other person's phones, and on occasion, would act as if she was to screen people's calls. Appellee's Exh. 33.

- d. "On March 18, 2014 I received a transferred call from a lady who later wrote an email to me telling me that you were very unprofessional rude and had a very hateful demeanor during a phone call that she made to our office."

Shannon Sheffert, Appellant's supervisor, testified he spoke on the phone with Cathy Davis who complained that Appellant had been very rude to her when she called to speak with Terri Wade and wanted to know how such a person could be allowed to work as a receptionist. Mr. Sheffert documented the phone call and requested and received an email from Ms. Davis summarizing her phone conversation with Appellant. Appellee's Exh. 31 and 32, respectively. Appellant testified that Ms. Davis had called numerous times and that she had instructed Ms. Davis to contact Ms. Wade on her personal phone.

- e. "On April 3, 2014, you attended the first day of a two day HRDS training class at the Tom Steed Center at Rose State College in Midwest City, Oklahoma. You did not have management approval to attend this class and you had not been registered to attend this class by the ODOT Training Division. The records of the Human Capital Management

Division of the Office of Management and Enterprise Services do not reflect that you were listed on the roster of attendees for this training class.”

Mr. Sheffert testified that on February 26, 2014, at 9:22:18 A.M., he was copied on an email from Ann Simon, ODOT Training Division, in which Ms. Simon informed Appellant that she had been placed on a wait list for three (3) training courses, including a course scheduled for April 3, 2014. In response that same day, Mr. Sheffert sent Appellant an email at 10:06 A.M. in which he instructed Appellant to concentrate on her job tasks, that she was not authorized to enroll in any classes, and to see him with specific requests or needs for classes before sending in requests to take classes. Appellant’s Exh. D, p. 1. Upon learning the Appellant had gone to Rose State College for training contrary to his instructions, Mr. Sheffert went to Rose State and served Appellant with the notice of intent to discharge Appellant from employment with ODOT. Appellee’s Exh. 35.

Appellant asserted that Mr. Sheffert had told her to get phone training during a meeting to discuss her PMP in 2013 and he was aware of her attending because it was on her calendar.

- f. “You were previously placed on a 10 day suspension without pay from June 24, 2013, through July 12, 2013, for similar actions relating to your unprofessional conduct dealing with the public on phone calls

and for causing disruptions within the work place. On March 13, 2013, and June 10, 2011, you received written reprimands for making unprofessional comments and disrupting the work environment. I also advised you that further violations would result in more stringent disciplinary action up to and including discharge.”

- g. “This Division cannot function as it should because of your behaviors. The conflict and tension you create is detrimental to the employees and the public.”
- h. “Your conduct is considered misconduct, insubordination, conduct unbecoming a public employee and just cause which is a violation of Merit Rule 530:10-11-91, Conduct of a classified employee. Merit Rule 530:10-11-91(a) indicates that every classified employee shall fulfill to the best of his or her ability the duties of the office or position conferred upon the employee and shall behave in a manner at all times befitting the office or position the employee holds. Merit Rule 530:10-11-91(d) indicates that each classified employee shall devote full time, attention and effort to the duties and responsibilities of his or her position during assigned hours of duty.”

Appellant’s Exh. A; Appellee’s Exh. 39.

3. ODOT terminated Appellant’s employment on April 25, 2014. Appellant timely filed her Petition for Appeal on May 7, 2014. Appellant’s Exh. A.

4. Shannon Sheffert, Local Government Division Supervisor, supervised Appellant from 2007 until her discharge. Mr. Sheffert did not complete performance evaluations for each year he supervised Appellant. Testimony of Shannon Sheffert and Appellant. Although Mr. Sheffert had agreed to complete all of Appellant's evaluations in the Mediation conducted on May 15, 2012 (Appellant's Exh. J), he did not.

5. Mr. Sheffert had opened the 2012 evaluation (February 1, 2011 through January 31, 2012) for Appellant on June 14, 2011 (Appellant's Exh. H, p. 5), but neither the mid-year or end-of-evaluation-year meetings between Mr. Sheffert and Appellant occurred to complete that evaluation (Appellant's Exh. H, p. 10).

6. The 2013 evaluation (February 1, 2012 through January 31, 2013) was not conducted pursuant to ODOT policy because Mr. Sheffert and Appellant did not meet at the beginning of the evaluation year or at mid-year. Appellant's Exh. H, p. 15. On April 9, 2013, Mr. Sheffert met with Appellant to discuss the evaluation, but Appellant refused to accept or sign the evaluation because it had not been completed in accordance with ODOT Policy. Testimony of Appellant; Appellant's Exh. H, p. 15. Mr. Sheffert testified that he had attempted to meet and finish the 2013 evaluation on advice of Mr. Kirtley in order to get the evaluation process started for the evaluation period that had ended and to begin a new evaluation period. Testimony of Shannon Sheffert and Brian Kirtley.

7. Although the Specifics of Cause stated that Appellant had used her work station computer for personal use during working hours, there is insufficient evidence to find that Appellant used her work computer for personal use, other than for brief instances, which would constitute cause for termination. Further, testimony of multiple witnesses indicated that each had used a work computer or phone for brief instances to

check the weather, traffic or call a family member without any adverse action being taken against them by ODOT.

8. In regard to paragraph 2a above, the text of which is listed in the Specifics of Cause, there is sufficient evidence to determine that on January 28, 2014 Appellant initiated an argument with Chad Meisenburg in his office about a disagreement Appellant had about job assignments Mr. Meisenburg was apparently given that Appellant believed overlapped with her job tasks. Mr. Meisenburg had to ask tell her several times to discuss the issue with Mr. Shannon and leave his office. Testimony of Chad Meisenburg; Appellee's Exh. 24.

9. In regard to paragraph 2b above, the text of which is listed in the Specifics of Cause, there is sufficient evidence to determine that on February 4, 2014 Appellant, after entering Mark Scott's office to deliver mail, interrupted him repeatedly when he tried to inform Appellant that a phone malfunction had been corrected and that he needed Appellant to set up his voice mail and retrieve any messages for him, but could not as Appellant continued to complain about the extra modules in the phone system and the unnecessary costs to ODOT. After being interrupted by Appellant several times when he attempted to request phone assistance of Appellant, Mr. Scott told her to leave his office and Appellant left.

10. In regard to paragraph 2c above, the text of which is listed in the Specifics of Cause, there is sufficient evidence to determine that on March 13, 2014 Appellant did speak loudly, and was rude and unprofessional in the manner in which she spoke to the caller. Testimony of Roger Chambers, Shannon Sheffert and Terri Wade; Appellee's

Exh. 28-30; admission by Appellant of speaking loudly and being angry because the collection company had called Appellant's mother on some other occasion.

11. In regard to paragraph 2d above, the text of which is listed in the Specifics of Cause, there is sufficient evidence to determine that on March 18, 2014 Appellant did speak loudly, and was rude and unprofessional in the manner in which Appellant spoke to a person on the phone who was trying to speak with Terri Wade. The caller was later determined to be Cathy Davis. Testimony of Shannon Sheffert; Appellee's Exh. 31-33.

12. In regard to paragraph 2e above, the text of which is listed in the Specifics of Cause, there is sufficient evidence to determine that on April 3, 2014 Appellant did attend a training course at Rose State College after being instructed by her supervisor, Shannon Sheffert, by email on February 26, 2014, to not enroll in any training classes without speaking with him about specific requests or needs for classes before enrolling. Testimony of Shannon Sheffert; Appellee's Exh. 35.

13. In regard to paragraph 2 above, the remaining subparagraphs f, g and h include a summary of Appellant's prior disciplinary actions and conclusory statements and characterizations of Appellant's conduct which Appellee asserts justifies Appellant's termination by ODOT.

14. There is sufficient evidence to determine that Appellee completed the Disciplinary Certificate dated April 3, 2014 for Appellant which certified that all mandatory progressive discipline actions as required by statute had been taken before the pre-termination hearing. Testimony of Brian Kirtley, ODOT Human Resources Manager; Appellee's Exh. 35, Proposed Disciplinary Action-Disciplinary Certificate; Appellee's Exh. 39, Notice of Discharge-Disciplinary Certificate.

15. There is sufficient evidence in the record to determine that Appellee's failure to complete performance evaluations on Appellant did not comply with ODOT policy and applicable law.

16. Although disciplinary actions were taken against Appellant after her grievance filed against Shannon Sheffert in 2012, there is sufficient evidence to determine that disciplinary action had been taken against Appellant prior to the 2012 grievance and that Appellee had legitimate reasons for imposing discipline on Appellant thereafter.

17. There is no evidence in the record indicating that any past mandatory discipline imposed on Appellant had been reversed upon appeal. There was evidence in the record that the appeal of Appellant's suspension without pay had been affirmed by the district court in judicial review of the decision by the Merit Protection Commission to uphold the suspension without pay.

CONCLUSIONS OF LAW

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

2. The burden of proof for Appellee to prove that Appellant's termination was lawful is by a preponderance of the evidence ("sufficient evidence").

3. As a classified employee, Appellant is subject to the Merit System and has a right to appeal her discharge to the Merit Protection Commission. 74 OS §840-6.5; Merit Rule 455:10-3-7.

4. There is sufficient evidence in the record that Appellee applied progressive discipline correctly. 74 OS §840-6.3; Merit Rule 455:10-11-4.

5. There is insufficient evidence to find that Appellant's discharge was in retaliation for her use of the grievance process or in violation of the Whistleblower Act. 74 OS §840-2.5.

6. There is sufficient evidence in the record to find that Findings of Fact paragraphs 10 and 11 constitute conduct unbecoming a public employee by Appellant.

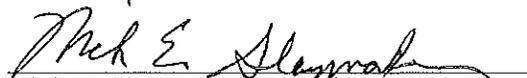
7. There is sufficient evidence in the record to find that Findings of Fact paragraph 12 constitutes insubordination by Appellant.

8. There is sufficient evidence in the record to find that Findings of Fact paragraphs 8, 9, 10, 11 and 12 in the aggregate constitute misconduct by Appellant and are just cause for the termination of Appellant's employment from Appellee.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant is hereby **DENIED** and the action of Appellee, discharge, is upheld.

DATED this 29th day of March 2016.


Nick E. Slaymaker, OBA # 14320
Administrative Law Judge
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