



FILED
OSAH

JAN 28 2013

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

FRANK CASTELLANA,	:	
Petitioner,	:	
	:	Docket No.:
v.	:	OSAH-SPB-DIS-1323999-75-Teate
	:	
DEPARTMENT OF TRANSPORTATION,	:	
Respondent.	:	

K. Westray
 Kevin Westray, Legal Assistant

INITIAL DECISION

I. Introduction

Frank Castellana, (hereinafter “Mr. Castellana”), appealed the Georgia Department of Transportation’s (GDOT’s) decision to terminate his position as a clerk. At a hearing at the Office of States Administrative Hearings on January 16, 2013, Mr. Castellana represented himself and Angela W. Jones, Esq. represented GDOT. For the reasons stated below, GDOT’s decision to terminate Mr. Castellana is **AFFIRMED**.

II. Findings of Fact

Current Position and Supervision

1. Mr. Castellana is a classified employee who last worked in a Clerk 2 position in GDOT’s Procurement _ General Support Department located in Fulton County. The position is described at length in performance evaluations; however, the duties described are those routinely associated with a filing clerk position. Jared Hill, (hereinafter, “Mr. Hill”), has been as Mr. Castellana’s immediate supervisor since December 16, 2010. There are routinely four people under Mr. Hill’s supervision in that department, including Mr. Castellana. (Testimony of Mr. Hill, Record Management Officer; Testimony of Mr. Castellana; Respondent Exhibits P and Q).

November 15, 2012 Incident

2. Sometime between 3:00 p.m. and 3:30 p.m. on November 15, 2012, while Mr. Hill was away from the office, Carmalita Howard, (hereinafter “Ms. Howard”), one of the other clerks, was training Keisha Fields, (hereinafter “Ms. Fields”), a new clerk in that department, and intermittently discussing an oxtail recipe with her. Mr. Castellana was sitting across the room at his desk viewing his computer screen. The office area is an open area with desks and a printer along one of the perimeters of the work area where orders for files are received. The printer sounded indicating a file had come through. Since Ms. Howard was training Ms. Fields, she asked Mr. Castellana if he was going to pull the file. Inasmuch as he did not respond and rather than renewing the inquiry, Ms. Howard walked past his desk to the printer to pull the file.

(Testimony of Ms. Howard; Testimony of Ms. Fields; Respondent Exhibits R and S).

3. As she passed his desk, he jumped and turned to her which prompted her to turn to see why he was startled. At that moment, she observed pornographic images of sexual acts on his computer screen. Although she was startled by the images, she continued to retrieve the file request and pretended not to notice what she had seen. After Mr. Castellana apparently assumed Ms. Howard was no longer looking, he continued viewing his screen until he left for the day about 15 minutes later at 3:30 p.m. As she returned to the desk where Ms. Fields was sitting, Ms. Fields rose and turned toward the area of Mr. Castellana's desk at which time she also saw sexually explicit images on his screen. Ms. Fields wanted no trouble and immediately looked away. (Testimony of Ms. Howard; Testimony of Ms. Fields; Testimony of Mr. Hill; Respondent Exhibits R and S).

4. After Mr. Castellana left the office for the day at approximately 3:30 p.m., Ms. Howard called Mr. Hill, their supervisor, and reported the incident. Mr. Hill indicated that he would deal with the situation when he returned to the office. He also instructed her to write a concise and unelaborated account of what she had observed and to instruct Ms. Fields to do so as well. Ms. Howard and Ms. Fields complied with his directives in emails at approximately 4:30 p.m. Ms. Howard reported Mr. Castellana's screen as displaying "pictures of sexual nature involving several men engaging in sexual activity. Ms. Fields reported "pornographic photos of men having sexual intercourse with each other."¹ (Testimony of Ms. Howard; Testimony of Ms. Fields; Testimony of Mr. Hill; Respondent Exhibits S and T).

Information Technology (IT) Investigation of November 15, 2012 incident

5. On either November 17 or November 18, Jim Barth, a GDPT Service Team Leader, who is charged with network security, received a management request to conduct a technical audit of a designated computer for the work week from November 12 through November 16. Mr. Barth had no initial knowledge of whom it was assigned. He also had no knowledge of the reason that prompted the security review request. (Testimony of Jim Barth).

6. Initial review indicated the user as Mr. Castellana, with whom Mr. Barth remains unfamiliar other than through technical investigation results. The browser history on Mr. Castellana's computer indicated a lack of internet trail that is inconsistent with normal internet activity. Lack of such a trail suggests deletion from the browser history search file. For a security inquiry, it also suggests the need for further inquiry. Utilizing technical procedures that preserve the integrity of the designated computer's hard drive, Mr. Barth created a backup that mirrored the hard drive and allowed him to run a recovery program that creates a user detail report where items such as those deleted from the viewing history can again be viewed. (Testimony of Jim

¹ Subsequent statements made by Ms. Howard and Ms. Fields on November 30 incident to human resources investigation of the incident were consistent with those original observations. (Respondent Exhibits S and T). Mr. Castellana's behaviors have prompted prior complaints from Ms. Howard that prompted coachings on October 7, 2009 and May 4 2010 regarding Mr. Castellana's behaviors while interacting with Ms. Howard. Incident to a complaint with EEO that Ms. Howard filed, the EEO Administrator in April 2010 informally addressed misconduct toward Ms. Howard with Mr. Castellana. Subsequently, regarding another EEO claim, Mr. Hill received an Investigative Summary Report from EEO that resulted in a written reprimand against Mr. Castellana on September 9, 2011. (Respondent Exhibit J; Testimony of Jared Hill).

Barth).

7. Sorted by category, the user detail report indicated 25 visits to four porn sites identified as porn sites by the report as well as downloads from those sites. Additionally, various search strings created by the user were inappropriately sexual in nature and would prompt visits to sites such as Wikipedia that is not immediately identified as pornographic by the program but contains images that are sexual in nature and inappropriate for the workplace. Several such images were also downloaded. Specifically, between the time of 3:00 p.m. and 3:30 p.m. on November 15, Mr. Castellana was viewing sexually explicit materials and continued to do so through 3:28 p.m. (Testimony of Jim Barth; Respondent Exhibits T and U).

Use of Computers in the Workplace

8. Mr. Castellana last acknowledged receipt of a GDOT Employee Handbook on June 24, 2005. Under Section 311, Use of Data, employees are informed that all computer data accessed through the Internet must not contain content that could be considered offensive, obscene, intimidating, or disruptive to any employee or other person. The display of sexually explicit images is prohibited. Violations of any policy affecting the agency or an employee's employment, misconduct or behavior that may have a negative effect on the agency's reputation, misuse of State property, conduct or behavior to other employees are non-exclusively some inappropriate activities that are prohibited. (Respondent Exhibits V and Z).

9. In addition to the Handbook restrictions, workplace notices are issued to employees. One such notice is GDOT Policy 8010-3 User Responsibilities and Acknowledgements to the Computer Information Systems. In that policy, GDOT restricts viewing pornographic materials as well as accessing sexually explicit, obscene or pornographic material that could be considered discriminatory, offensive, threatening, harassing or intimidating. Mr. Castellana acknowledged this policy on at least two occasions as evidenced by his signature on acknowledgements on December 3, 2002 and March 8, 2011. (Respondent Exhibits Y and Z).

Sexual Harassment Policy

10. GDOT workplace notices also include GDOT Policy 2880-1 Sexual Harassment Policy of conduct. The display of pornographic or sexually-oriented materials in the workplace is expressly prohibited within that policy. Mr. Castellana has received training and acknowledged understanding of this policy on multiple occasions as evidenced by his signature on acknowledgements on March 14, 2008 and May 25, 2010. Most recently, he received classroom instruction on October 13, 2012. (Respondent Exhibits W and Z).

Standards of Conduct

11. With regard to standards of conduct, GDOT employees are required to comply with the Code of Ethics for Government Service, The Governor's Executive Order dated January 10, 2011, and all GDOT policies. GDOT Policy 2255-1 Standards of Conduct requires employees to be alert in conducting business with employees and non-employees to avoid even the appearance of misconduct. Further, employees must maintain a professional, civil and courteous

relationship with their co-workers. Mr. Castellana received classroom training regarding these standards on May 25, 2010. (Respondent Exhibits X and Z).

12. Mr. Castellana intentionally deleted his internet activities by clearing his internet viewing history in a deliberate attempt to conceal his actions. (Testimony of Jim Barth; Respondent Exhibits T and U).

Determination of Adverse Action

13. GDOT issued a notice of dismissal signed by Mr. Young on December 12, 2012 indicating:

This proposed dismissal is based on your misconduct, including your ongoing poor work history and your recent violation of the following Georgia Department of Transportation (GDOT) policies: *User Responsibilities and Acknowledgements to the Computer Information Systems Policy (8010-3)*, *Standards of Conduct (2255-1)* and *Sexual Harassment Policy (2880-1)*.

The notice included three paragraphs detailing misconduct on November 15, 2012 that is the misconduct prompting adverse employment action as well as approximately two pages of bulleted points outlining performance related matters in Mr. Castellana's employment file that include memorandums of concern, written reprimands, and verbal coachings between March 11, 2005 and October 9, 2012. (Testimony of Treasury Young; Respondent Exhibit A).

14. In making his determination of the appropriate sanction for the misconduct identified, Mr. Young reviewed Mr. Castellana's employment record that included several incidents of misconduct and other policy violations between March 11, 2005 and October 9, 2012 that are outlined in the December 12 dismissal notice. Those employment incidents involved various counseling, reprimands and reminders regarding maintenance of a professional, businesslike, positive and courteous relationship with fellow employees and use of time constructively. Mr. Young also looked at Mr. Castellana's last two performance evaluations. While meeting expectations, both evaluations were marginal and reflected problem areas. Mr. Castellana refused to sign the last such evaluation that was slightly less favorable than the prior ones. Overall, those evaluations and Mr. Castellana's work performance, as indicated by management need for the many actions previously taken, reflect poor work performance. (Testimony of Treasury Young; Respondent Exhibit A).

15. In one past incident, Mr. Castellana received a memo on July 25, 2011 regarding professionalism in the workplace and acceptable conduct after he was instructed to stop making inappropriate and offensive noises in the workplace. Those noise mimicked sounds associated with sexual activity. (Respondent Exhibits A and L; Testimony of Jared Hill, Supervisor).

16. After receiving the December 12, 2012 notification, Mr. Castellana requested an internal appeal in accordance with GDOT procedures. Incident to that request, Todd Long, the Deputy Commissioner as the Commissioner's Designee, met with Mr. Castellana on December 18, 2012. During that meeting, Mr. Castellana provided information that purported to refute many of the employment actions taken against him; however, Mr. Castellana provided no conclusive

evidence that his supervisors had acted inappropriately. (Testimony of Todd Long).

17. Mr. Castellana candidly admitted to Mr. Long that he had accessed pornographic websites indicated in the IT report and that he routinely made such searches at work for a month or so. Although he denied accessing and viewing such materials in the presence of others, Mr. Long found particularly egregious Mr. Castellana's conduct of still viewing such material after he had become aware or should have been aware that it was seen, or could have been seen, by his co-workers. (Testimony of Todd Long).

18. After Mr. Long's review, GDOT issued its final determination of dismissal in a letter dated December 20, 2012 signed by Mr. Long that incorporated the misconduct outlined by Mr. Young in the December 12, 2012 dismissal notice.

19. Mr. Castellana filed his current appeal with the Office of State Administrative Hearings on December 26, 2012 in a letter dated December 24. In his letter, Mr. Castellana does not deny the allegations made. Rather, he states that the allegations are "exaggerated." (OSAH Form 1 attachment).

III. Conclusions of Law

1. Under State Personnel Board Rules, an employee may be dismissed for the following reasons: "negligence or inefficiency in performing assigned duties; inability or unfitness to perform assigned duties; insubordination; misconduct; conduct reflecting discredit on the department; commission of a felony or other crime involving moral turpitude; chronic tardiness or absenteeism; failure to report for or remain at work without justifiable cause; failure to process performance appraisals in a timely manner; or political activity in violation of 478-1-.08." Ga. Comp. R & Regs. r. 478-1-.24(7)(b)(3). Although Mr. Castellana's behavior may also constitute conduct reflecting discredit on the department, the dismissal notice is based on misconduct alone as outlined.

2. GDOT defines employee standards of conduct within a non-exclusive list of all expectations as well as clearly prohibited activities while on duty or at work. *GDOT Employee Handbook*, Section 309 Standards of Conduct (2005), pp. 31-32. Such expectations include maintaining a professional and business-like relationship with co-workers, behaving in a courteous and professional manner in the presence of other employees and using work time effectively. *Id.* Prohibitions include misconduct, abusing State property, conduct or behavior offensive to other employees, and unprofessional behavior. *Id.* Employees who engage in the listed prohibited activities or otherwise engage in misconduct are subject to disciplinary action, up to and including dismissal. *Id.* The abuse of State property also includes misuse of GDOT Property outlined in Section 311 of the Handbook. *GDOT Employee Handbook*, Section 311 Standards of Use of GDOT Property (2005), p. 33. All computer data, including data obtained over the Internet, becomes part of GDOT's official records that is subject to public scrutiny. *Id.* Data accessed or received via the Internet must not contain content that could be considered discriminatory, offensive, obscene or disruptive to any employee or other person. *Id.* Misuse also includes anything that may be construed as showing disrespect for others. *Id.* Mr.

Castellana's actions in accessing and downloading pornographic materials alone constitute misconduct on each of at least 25 visits to pornographic sights between November 12 and November 16. By his own admission, his visits to such sights were routine over at least a two month period and may be presumed to greatly exceed the 25 visits documented by the IT investigative report for merely a four day period. The data obtained was clearly offensive to the two employees who were subjected to viewing the displays as a result of Mr. Castellana's careless use of his assigned computer. All such actions within the context of the workplace are misconduct in that they are, at a minimum, unprofessional.

3. GDOT employee conduct is also defined in its Policies and Procedures that were directly cited regarding Mr. Castellana's misconduct on November 15, 2012:

Violation of Policy 8010-3 relating to computer information systems

Inappropriate usage under GDOT Policy 8010-3 includes: viewing pornographic materials; accessing sexually explicit, obscene, or pornographic material; or accessing material that could be considered offensive. *GDOT Publications Policies & Procedures*, Policy: 8010-3 User Responsibilities and Acknowledgements to the Computer Information Systems Policy, p. 2. An employee must not voluntarily acquire any sexually explicit or sexually oriented materials and such materials cannot be downloaded to a GDOT computer. *Id.*, (C) (13). Deleting history items to avoid detection of misconduct constitutes an activity that circumvents GDOT security or access controls. *Id.*, (C) (18). Deleting browser history items impedes GDOT's right to access and review anything created or stored on GDOT systems without GDOT consent. *Id.*, (C) (23). Mr. Castellana flagrantly violated these policies on multiple occasions.

Violation of Policy 2880-1 regarding sexual harassment

Conduct of a sexual nature that creates an offensive work environment may constitute sexual harassment *GDOT Policy: 2880-1 Sexual Harassment Policy*, p. 1. Expressly prohibited behaviors that may constitute such conduct and are prohibited include displaying pornographic or sexually-oriented materials. Mr. Castellana recklessly displayed such images and continued to do so after he knew or should have known that a fellow female employee had observed him doing so.

Violation of Policy 2255-1 Standards of Conduct

During work hours, all employees are expected to maintain a professional, businesslike, positive, and courteous relationship with fellow employees. *GDOT Policy: 2255-1 Standards of Conduct*, p. 5. Prohibited behaviors such as sexual-related conversations are expressly prohibited; however, prohibited behaviors are not limited to those listed. *Id.* Displaying pornographic or explicitly sexual images that a fellow employee can observe is obviously included in prohibitions not expressly stated. This standard is designed to make employees comply with Federal and State laws, the Code of Ethics for Government Service in O.C.G.A. § 45-10-1, the Governor's Executive Order dated January 10, 2011, and all GDOT policies. *Id.*, Mr. Castellana's actions in the work place clearly violated this standard.

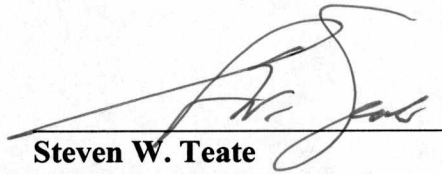
4. While GDOT may consider progressive disciplinary steps that would include a review of past employment issues, GDOT is not required to do so and may dismiss an employee for acts of misconduct such as those here described. Whether viewed independently or in conjunction with prior employment history, the sanction of dismissal that was chosen is entirely reasonable given the extent of Mr. Castellana's misconduct. This conclusion would be the same even if only the violations under Policy 8010-3 relating to computer information systems were substantiated. The violations were flagrant and repeated with attempted concealment from GDOT.

5. GDOT bears the burden of proof in this matter. Ga. Comp. R. & Regs. r. 616-1-2-.07. The standard of proof is by preponderance of the evidence. Ga. Comp. R. & Regs. r. 616-1-2-.21(4). GDOT's evidence supporting its conclusion that dismissal was appropriate for misconduct indicated in the December 20, 2012 dismissal notice is supported by a preponderance of the evidence presented. Mr. Castellana's evidence to the contrary fails to effectively rebut any of the misconduct upon which this action was based.

IV. Decision

For the foregoing reasons, Respondent's decision to terminate Petitioner per notice issued on December 20, 2012 is **AFFIRMED**.

SO ORDERED, this 28th day of January 2013.



Steven W. Teate
Administrative Law Judge