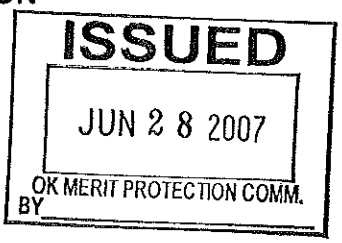
OKLAHOMA MERIT PROTECTION COMMISSION

STATE OF OKLAHOMA



EDWARD DON HUDSON, JR., Appellant	)	
vs.	)	CASE NO. MPC 07-117
DEPARTMENT OF HUMAN SERVICES, Appellee.	)	

ORDER

Hearing on this matter was held before the undersigned duly appointed Administrative Law Judge on June 6, 2007, at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant, Edward Don Hudson, Jr., appeared in person and was represented by Larry Balcerak, Esq. Appellee, Department of Human Services (hereinafter referred to as "DHS" or "Appellee"), appeared by and through its counsel, John E. Douglas, Assistant General Counsel, and table representative, Jeff Livingston, Administrator of the Southern Oklahoma Resource Center (hereinafter referred to as "SORC").

Appellant, a permanent classified employee of Appellee, was discharged from his position as a Direct Care Specialist II at SORC for allegedly engaging in behavior that was insubordinate, discourteous to clients and other employees, unbecoming a public employee, and for exhibiting a violent and threatening demeanor at the work site, all in violation of agency policies and procedures.

Whereupon, the sworn testimony of witnesses for both Appellee and Appellant was presented, along with exhibits, which are incorporated herein and made a part

hereof. Accordingly, 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.

FINDINGS OF FACT

Appellant was a Direct Care Specialist II at the Southern Oklahoma Resource Center (SORC), in Pauls Valley, where he had been employed approximately four years. SORC is a residential facility that houses developmentally disabled clients. At the time of the actions giving rise to the agency's discharge, Appellant was under investigation for possible client abuse. During the investigation, Appellant was temporarily reassigned to a position that did not involve working with clients. While in this position, Appellant was given notice of discharge for failing to report to work or call in for three consecutive days. When Appellant learned of this discharge action, he became extremely upset. On the morning of June 14, 2006 Appellant telephoned Assistant Administrator Mia Monroe-Smith, accusing her of being responsible for his discharge, warning her to "watch out", she hadn't heard the last of him. (Jt. Exhibit 10)

Minutes later Appellant appeared at the administration building at SORC, first demanding to see Administrator Jeff Livingston then, unable to find him in his office, Appellant attempted to confront Ms. Monroe-Smith. Elizabeth Riddle, assistant to Mr. Livingston, testified that Appellant spoke in a loud, angry voice and appeared very angry and out of control. Ms. Monroe-Smith had been advised by Mr. Livingston that Appellant was in the building and to close her door and not come out. She testified that she heard Appellant banging on her door, yelling angrily that he knew she was in there.

When Appellant finally left the administration building, Ms. Monroe-Smith testified that she saw him get in his pick-up truck and speed out of the parking lot up the road toward the residence buildings, then slam on his breaks and abruptly back his truck down the road and turn toward the Quality Assurance office. She testified that he was driving fast and recklessly. Administrator Livingston called Ms. Monroe-Smith and told her to meet him outside. They got into his truck and drove toward campus, but discovered that Appellant was behind them. They turned back toward the administration building while Appellant turned toward the exit gate and left campus. Upset and frightened, Ms. Monroe-Smith left campus and filed a police report with the Pauls Valley Police Department. (Jt. Exhibit 10)

Sheila Rayburn, Supervisor of the Quality Assurance Office, was present when Appellant entered the building. She had seen him drive on campus that morning and was surprised to see him some two hours before his 11:30 am scheduled meeting with the investigator in the client abuse investigation. Ms. Rayburn testified that Appellant appeared angry when he entered the office and was yelling that he wanted his name cleared immediately. When he left the office, she saw him get in his pick-up, speed down the road and run a stop sign before pulling behind Ms. Monroe-Smith's and Mr. Livingston's vehicle. She watched him follow that vehicle until they were out of her sight.

After Appellant left the administration building Ms. Monroe-Smith called his supervisor, Johnston Murray Cottage Building Supervisor Rochelle Sturdevant, to warn her that he was on campus and had left the administration building, upset and yelling. Ms. Sturdevant left the cottage but when she returned, encountered Appellant shouting

at another supervisor. He was extremely angry and loud, and turning his attention to Ms. Sturdevant, accused her of being "in on all this", responsible for his discharge, and warned her to "watch your family, if you have one." She watched Appellant get into his vehicle and speed off, coming within five feet of hitting one of the SORC clients on his bicycle. (Jt. Exhibit 11) Ms. Sturdevant testified that she watched Appellant speed down the road and run stop signs to "chase" Mr. Livingston's and Ms. Monroe-Smith's vehicle. (Sturdevant testimony and Jt. Exhibit 11) Later that day she filed a report of the incident with the Paul's Valley Police Department. (Jt. Exhibit 11)

After Appellant left SORC, he returned a short time later and went to the D&E Building where he was scheduled to meet with Office of Client Advocacy investigator Teresa Moore later that morning. As Sherry Ehrhart, program coordinator, entered the building for her meeting with Ms. Moore, she heard yelling and saw Appellant pounding on the door to Ms. Moore's office demanding that she interview him now, rather than at his later scheduled time. Through the closed door Ms. Moore responded that she was unable to interview him at that time. Ms. Ehrhart testified that when Appellant noticed her watching him, she left the area, concerned that he might come after her. After more pounding on the door and yelling, Appellant left. Ms. Moore came out of her office and Ms. Ehrhart saw that she was visibly shaken. They did not hold their meeting as scheduled.

Learning that Appellant had returned to campus, Administrator Livingston found Appellant and stopped him as he was leaving campus and asked Appellant to accompany him to the office of SORC personnel director, Jerry Tomlinson. Earlier that morning during Appellant's first visit to SORC, Administrator Livingston had called Mr.

Tomlinson and directed him to call the Pauls Valley police to the campus. They arrived while Messrs. Livingston and Tomlinson were meeting with Appellant. Administrator Livingston dismissed the police, believing that Appellant had calmed down and the situation was under control. Following the meeting, Appellant left campus without further incident.

As a result of Appellant's behavior on June 14, 2006 two reports were filed with the Pauls Valley Police Department that day – one by Ms. Monroe-Smith (Jt. Exhibit 10) and the other by Ms. Sturdevant (Jt. Exhibit 11). Both ladies also reported the matter to the agency Risk, Safety and Emergency Management Department. An investigation of the incident was commenced the following day. Between June 15 and July 7, 2006 Social Service Inspector Peggy Bauman, from the Risk, Safety and Emergency Management Department, talked with witnesses Mia Monroe-Smith, Robin Thomas, Rachelle Sturdevant, Jeff Livingston, Nancy Wright, Teresa Moore and Pauls Valley Police Detective Jeff Jarman, and prepared an investigation report. (Jt. Exhibit 7)

Following the client abuse investigation, Appellant was cleared of all client abuse allegations. However, his discharge stood for failing to appear for work or call concerning his absence for three consecutive days. There was no further mention of Appellant's behavior on June 14, 2006. Mr. Tomlinson testified that since Appellant was terminated, there was no need to act on the June 14 incident.

Appellant appealed his termination. For reasons not revealed at the hearing in this case, Appellee determined that its case for termination was not as strong as was initially thought, and on October 18, 2006 entered into a settlement agreement with Appellant to withdraw the discharge, return him to work with back pay and benefits, and

expunge his personnel record of any mention of the discharge. (Jt. Exhibit 27) Then on December 8, 2006 Appellee issued a written reprimand to Appellant for his actions of June 14, 2006. On January 5, 2007 Appellant was notified of Appellee's intent to discharge him for his actions of June 14, 2006 for behavior that was insubordinate, discourteous to clients and other employees, unbecoming a public employee and for violent and threatening demeanor at the work site. The written reprimand was ultimately rescinded. Appellant filed this appeal claiming that the Settlement Agreement of October 18, 2006 precludes Appellee from taking action on the June 14, 2006 incidents. This administrative law judge agrees.

DISCUSSION

Appellee argues (1) that Appellant's behavior justifies the discipline imposed; (2) that even though it took six months to address, it should not be discounted; (3) that the appointing authority can change his mind about the discipline imposed; (4) that the Settlement Agreement could have been worded differently, but that it is up to Appellant to specifically have included the June 14, 2006 incident. The fact that it was not referenced in the Settlement Agreement means that it was not covered by the Agreement.

In addressing Appellee's arguments:

(1) This administrative law judge agrees that Appellant's behavior justifies the discipline imposed. Clearly the behavior Appellant exhibited on June 14, 2006 constitutes just cause for disciplinary action, and under usual circumstance discharge for such behavior would have been just.

(2) There may be circumstances where an agency may legitimately take six months to address a behavior, but this is not such a case. The facts were well known to Administrator Livingston at the time they occurred. He and Assistant Director Monroe-Smith were very involved in the incidents with Appellant. Police reports were filed, the police was called to campus, and the Risk, Safety and Emergency Management Department conducted an investigation and completed an undated investigation report seemingly in mid-July.

(3) An appointing authority certainly may change his mind about the discipline imposed. However, here there were no new facts justifying the change. Perhaps Administrator Livingston had second thoughts that the initial discipline imposed did not fit the magnitude of Appellant's behavior. Perhaps, as he indicated, he was not aware of the prior similar conduct by Appellant for which he had already received a written reprimand in November 2005. Whatever the rationale for Administrator Livingston's change in discipline from written reprimand to discharge, the change in discipline is not, in and of itself, reason for this judge to reverse the discipline imposed by the agency.[1]

(4) The fourth argument raised by Appellee is the basis for this reversal. The October 18, 2006 Settlement Agreement states:

> Recitals:
>
> . . .
>
> 3. The parties desire to compromise and resolve **all claims asserted or which could have been asserted in the Litigation** [*Appellant's discharge*

[1] From the beginning, the agency's handling of Appellant represents a comedy of errors. The evidence indicates that on several occasions prior to the June 14, 2006 incident Supervisor Sturdevant raised concerns about Appellant's fitness for duty that were never acted upon by the administration. Allegations of client abuse were made, investigated and found to be untrue. The agency failed to act appropriately and timely concerning the June 14, 2006 incident. The agency reversed itself on an attempt to discharge Appellant for failing to show for work or call for three consecutive days. The agency attempted to resurrect the June 14, 2006 incident to discharge Appellant after waiving the right to do so in the prior Settlement Agreement.

appeal, MPC 07-009] and have reached agreement as to the terms under which all disputes are hereby resolved.

Covenants of Hudson:

1. Hudson waives any claims he has or may have against DHS, or any of its officers and employees, **arising out of the circumstances leading to his discharge from DHS in June 2006, or any actions taken regarding Appellant since his discharge.**

Emphasis added

The apparent intent of this Settlement Agreement was to resolve and settle all matters surrounding Appellant's discharge in June 2006. It is the intent of settlement agreements to resolve all matters surrounding the discourse, unless the parties specifically reserve the right to pursue a course of action that arguably might be covered by the settlement agreement. There was no such reservation here. Contrary to Appellee's argument, it was not Appellant's responsibility to specifically include the June 14, 2006 incident in the Settlement Agreement. He had no reason to believe that Appellee would attempt to act on an incident that occurred five months earlier, and occurred in conjunction with the discharge that was the subject of the Settlement Agreement. As the drafter of the Settlement Agreement, it was up to Appellee to carve out a reservation or, failing to do so, to have it waived.

Further evidence that the Settlement Agreement was intended to cover the June 14, 2006 incident is the language contained in Appellant's covenant wherein he waived all claims he may have "arising out of the circumstances leading to his discharge from DHS in June 2006, or any actions taken regarding Appellant since his discharge." Though not specifically stated, the same waiver must be implied against Appellee. What is good for one party is good for the other party, as well. In this instance, both

parties waive their rights to bring actions against the other for actions arising out of the circumstances leading to Appellant's discharge in June 2006, or any actions following that discharge up to the date of the Settlement Agreement, October 18, 2006. When a disagreement or question arises concerning the interpretation of a contract, contract law construes the language of the contract against the drafter. As the drafter of the Settlement Agreement, Appellee's interpretation cannot stand.

Appellant's behavior on June 14 was insubordinate, threatening, and placed coworkers and residents at SORC in harms way. Appellant's behavior violated agency policies and rules as well as Merit Rules. Appellant's behavior deserved disciplinary action up to and including discharge. Appellant's behavior also was the direct result of, and ancillary to, his (apparently unsupportable) discharge which, along with all matters surrounding it, was settled by the Settlement Agreement on October 18, 2006. By the terms of the Settlement Agreement, as well as requirements of equity and justice, Appellant's actions on June 14, 2006 cannot be acted on in December 2006 (or January 2007), some six months after the incident and two months after the Settlement Agreement.

Although Appellant's behavior on June 14, 2006 violated DHS policies and warranted discipline up to and including discharge, the undersigned Administrative Law Judge finds that under the circumstances presented here, Appellee has failed to prove by a preponderance of the evidence that just cause exists to discipline Appellant, where Appellee entered into a Settlement Agreement with Appellant which resolved and/or waived action for Appellant's behavior on June 14, 2006.

CONCLUSIONS OF LAW

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

2. Merit Rule 455:10-11-14 states that a permanent classified employee may be discharged for misconduct, insubordination, willful violation of Merit Rules, conduct unbecoming a public employee, and any other just cause.

3. Merit Rule 455:10-9-2 states that the Appellee bears the burden of proof in an adverse action and must prove by a preponderance of the evidence that just cause exists for the action taken.

4. DHS:2-1-7(i)(2) states that an employee may be disciplined for misconduct, including (E) insubordination and (H) discourteous treatment of clients and other employees or the general public.

5. DHS:2-1-7(i)(5) states that an employee may be disciplined for conduct unbecoming a public employee.

6. DHS:2-15-52 provides that an employee may be disciplined, including discharged, for harassing behavior and threats of violence in the workplace.

7. The Settlement Agreement of October 18, 2006 between Appellant and Appellee constitutes a binding contract between the parties and provides by its terms that its validity, construction, and enforcement shall be governed by the Oklahoma Merit Protection Commission.

8. It is a recognized tenant of contract law that when interpreting a contract, its provisions are to be construed against the drafter.

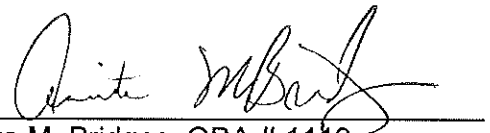
9. By the implicit and explicit terms of the October 18, 2006 Settlement Agreement, all matters related to the June 2006 discharge of Appellant were resolved, and Appellee, Department of Human Services, waived its right to discipline Appellant for his actions on June 14, 2006, where those actions were ancillary to and the result of his June 2006 discharge.

10. Appellee, Department of Human Services has failed to meet its burden to prove, by a preponderance of the evidence, that discharge of Appellant, Edward D. Hudson under the circumstances was just.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant is hereby **GRANTED**, the discharge is reversed and Appellee is directed to reinstate Appellant with benefits restored and backpay from the date of his discharge until the date he is advised to return to the workplace, less all income received by Appellant during such time period. Appellee is further ordered to expunge Appellant's personnel file of all reference to his discharge.

DATED this 22nd day of June, 2007



Annita M. Bridges, OBA # 1119
Administrative Law Judge
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