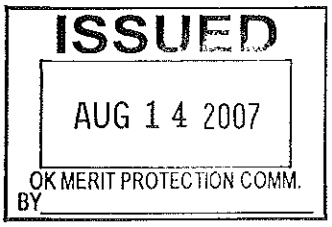
BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

SHARON A. HOLMES, Appellant,	)	
v.	)	Case No. MPC 07-128
DEPARTMENT OF HUMAN SERVICES, Appellee.	)	



FINAL ORDER

This matter comes on for hearing on August 1, 2007 before the duly appointed, undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma.. The Appellant, Sharon Holmes, appears personally, and through her non-attorney representative, Doyle Lewis. The Appellee, Department of Human Services, appears by and through counsel, John Douglas. Also present for Appellee was Table Representative, Renda Shelite.

Appellant, Sharon Holmes, was a permanent, classified state employee appealing an adverse disciplinary action of discharge of employment. Whereupon the hearing began and the sworn testimony of witnesses was presented, along with exhibits. Regarding the exhibits, the parties stipulated to the admission of Appellee's Exhibits # 1, 3, 5, 8 through 22, and 24. The parties stipulated to service and Exhibit 23 was deemed unnecessary. No other exhibits were offered by either party. Accordingly, all exhibits presented and admitted are incorporated herein and made a part hereof. The record was closed on August 1, 2007.

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

Appellant Sharon Holmes (hereinafter "Holmes") was a classifed employee of the Appellee Department of Human Services (hereinafter "DHS"). Holmes was a Direct Care Specialist employed at the Northern Oklahoma Resource Center (hereinafter "NORCE") in Enid, Oklahoma. The parties stipulated that the Merit Protection Commission (hereinafter "MPC") has jurisdiction of this matter, that Holmes was a permanent, classified employee of DHS, that the appeal is timely and to the application of Merit and DHS Rules.

NORCE is a residential care and rehabilitation facility for persons with mental retardation. The majority of the residents who live at NORCE have severe or profound mental retardation as well as other disabling medical or behavioral issues. It offers a variety of services to its residents, including vocational training, as well as meeting the residents' daily living needs. Employed in direct resident care at NORCE since 1980, Holmes had been assigned to work the 3rd shift (night shift) since approximately 2003. However, the evidence is conflicting as to the reason for her assignment to the night shift. DHS argued that Holmes was assigned to the night shift for light duty as a result of an on-the-job injury in March, 2003. Holmes stated that she requested that shift as a result of stress factors in her personal life, primarily the death of her daughter. As a general rule, the night shift, or 3rd shift, runs from 9:30 p.m. or 10:00 p.m. to 6 a.m., and is considered a "lighter shift" because most of the residents were sleeping throughout the shift.

Holmes did suffer an on-the-job injury in March, 2003 when she tripped and injured her arm, finger and both knees. Since that injury, Holmes had several surgical procedures, was off work for several short periods, and was assigned to light duty temporarily. On September 21, 2006 her treating physician determined she had reached maximum medical improvement and she was given a release to return to work with permanent restrictions. Those restrictions included limited work below the knees, limited kneeling, squatting, climbing and crawling, primarily sitting or sedentary work and

limited walking. (Appellee's Exhibits #5 and #18). Two different work releases dated the same day were provided. The only difference was that one contained a push/pull limitation of 3 pounds., which for purposes of this appeal, makes no difference given the other limitations.

Following receipt of the work release with permanent restrictions, Holmes filed a Request for Reasonable Accommodation on September 27, 2006 (Appellee's Exhibit #17). Holmes requested that an accommodation be granted to her to continue to work the night or 3rd shift. Holmes last day physically on duty was September 30, 2006. On October 9 and 10, 2006, DHS advised Holmes that it could not grant this request on a permanent basis due to the limitations listed by her physician. The ADA coordinator advised Holmes that the essential functions of her position would not accommodate her restrictions while ensuring the health, welfare and safety of the residents. He further explained that while they were able to accommodate her temporarily during her recuperation, it was not possible on a permanent basis. (Appellee's Exhibit #16). Holmes was then offered first preference for other positions. (Appellee's Exhibit #19). Holmes did make application for first preference (Appellee's Exhibits #21 and #22) requesting to be considered for any positions that accommodated her restrictions in Garfield, Kingfisher, Logan or Major counties. It was determined that there were no vacant positions at NORCE where Holmes could be placed and her request was forwarded to Risk Management for further consideration. (Appellee's Exhibit #20). On November 9, 2006 some positions were identified where Holmes met the minimum qualifications, however it was determined that no vacancies existed in Holmes requested counties. (Appellee's Exhibit #13).

On December 14, 2006 DHS concluded its review of Holmes' request for reasonable accommodation and her application for first preference. (Appellee's Exhibit #12). DHS advised Holmes that no reasonable accommodation could be granted as the essential job duties of a Direct Care Specialist prevented sedentary employment. There were also no vacant positions identified for which she qualified. She was offered the option of resigning her position in good standing, which she apparently declined.

On January 29, 2007 DHS provided Holmes with notice of the proposed disciplinary action to discharge her from her position (Appellee's Exhibit #10). This disciplinary action was based upon Holmes's inability to satisfactorily perform the essential functions of her position due to her medical limitations. Holmes was given an opportunity to provide a written response and a pre-termination hearing was scheduled for February 16, 2007. The pre-termination hearing was conducted by a hearing officer who found that Holmes was a valued employee of 27 years, but that she is no longer able to fulfill the duties of her position. The hearing officer concluded that her physical restrictions warranted discharge. (Appellee's Exhibit #9).

On March 23, 2007 DHS provided Holmes with notice of final formal discipline, discharging her from her position as a Direct Care Specialist effective March 27, 2007. The sole reason for the disciplinary action was Holmes' inability to satisfactorily perform the essential functions of her position due to her medical limitations. (Appellee's Exhibit #8).

The Testimony

The testimony of five witnesses, including the Appellant, was provided. DHS called three witnesses in support of its position.

Joseph Rice, employed in DHS Risk Management Office, testified that Holmes suffered a job-related injury in 2003 and had been on Temporary Total Disability. He testified that it is DHS policy to try to work with its employees as much as possible while they are recuperating, with the goal of assisting them to return to full employment. He stated that the essential job duties for direct care staff require employees to be able to lift and assist patients and respond to emergencies, as well as to be able to intervene to control residents with behavior problems. (Appellee's Exhibit #1). He stated that Holmes' limitations would not enable her to safely and effectively perform those duties. He stated that he considered the form which contained the push/pull limitation of 3 pounds, as that was the form that the Vocational Rehabilitation specialist used in the Workers' Compensation case. He also stated that the other limitations were so restrictive that the elimination of the push/pull limit would not have mattered in his determination. Rice admitted that he never talked to Holmes' physician about what "limited" meant. He

stated that he considered the Department of Labor standards of "less than one-third of the time" and that "primarily sedentary" would mean most of the time.

Mitch Buckminster, the ADA Coordinator at NORCE, testified that he researched Holmes' request for accommodation and determined that there were no primarily sedentary positions available at NORCE. He stated that in order to be granted a reasonable accommodation, the employee must still be able to perform the essential functions of the position, which Holmes was unable to do. He testified that he reviewed Holmes' request on an individual basis, reviewing her medical documentation and job description. He stated that she had been assigned to the night or 3rd shift at "Halfway House", a residential cottage at NORCE. Halfway House housed about nineteen or twenty residents with a range of disabilities. Generally, these residents function on a high level, but many still had profound medical or mental limitations. He discussed the MOPI or Methods of Protective Intervention training, which is used to address aggressive residents and clients. He testified that the push/pull limitation on Holmes' work release form was not a factor in his decision due to the other significant limitations.

Sally Randall, the Director at NORCE, testified that NORCE houses approximately one hundred and fifty individuals, ranging from borderline to profound disability level. She stated that some residents have a need for one-on-one care, with that being the highest level of need. She had been the Director of NORCE for one year, although she has worked over 30 years in the field during her career. She testified that the residents of the Halfway House at NORCE, where Holmes was assigned, are generally more active residents with less medical issues, however, some had significant behavioral problems and a few had secondary mental illnesses. She stated that the walking, kneeling and squatting limitations were a big obstacle to Holmes being able to satisfactorily perform her duties as direct care staff, but that the "sedentary" restriction was the biggest concern to her. She stated that in making her decision to terminate Holmes, she did not consider her prior discipline because it occurred over 7 years ago and it was not fair to include. (Appellee's Exhibit # 11). She testified that even on the night shift, staff was required to assist residents, respond to emergencies and to

periodically check on sleeping residents, so that "light duty" was impossible on a permanent basis.

Holmes offered the testimony of one witness and her own testimony. Clifford Porter was the 3rd shift supervisor of Holmes since 2003. He testified that Holmes was a friend of his sister's and that he had known her his entire life as they had grown up together in the same neighborhood. He stated that she had always been an excellent employee and was always able to perform her job duties. He said that he was under the impression that she was transferred to his shift due to personal stress issues. He said that Holmes often volunteered to work on her days off and also acted as the relief charge person when he was off duty. He testified that Holmes' Overall Performance Rating was "Exceeds Standards". (Appellee's Exhibit # 3). On cross-examination, Porter admitted that he had no knowledge of Holmes' medical limitations and could not recollect seeing any documents which detailed said limitations on either a temporary or permanent basis. He said that he had never imposed any limitations on Holmes. He admitted that the documents were periodically given to him, but he just filed them without further consideration.

Sharon Holmes testified that she had worked on the 3rd shift since late 2002. She stated that she had requested that shift due to personal stress she was experiencing after the murder of her daughter. She admitted that she tripped at work on March 7, 2003, injuring her arm, finger and both knees. She said that despite those injuries, she was able to perform all her job duties from 2003 until her release in September, 2006. She said that the push/pull limitation was an error and the physician amended his release the same day. She admitted that the medical limitations were submitted to the Workers' Compensation Court and that a settlement was reached awarding her a Permanent Partial Disability of 20% based in part upon those permanent limitations. She also admits that her duties as a Direct Care Specialist might require her to squat, kneel, walk or lift and that her physician had told her that she could not do those things. She also stated that she understood that even if she was able to continue to do those things, it could cause additional damage to her knees. She stated that her last day physically on duty was September 26, 2006. She testified that she had been unable to visit her physician since

her release and had not visited another physician to re-evaluate her limitations. She stated that she just wanted to be able to continue to do the job that she loved and had been doing for many years.

ISSUES

1. Is the Appellant capable of performing the essential job functions of her position as a Direct Care Specialist?

2. If so, was the action taken by DHS in terminating her employment proper and appropriate?

DISCUSSION

It is undisputed that Holmes was an excellent employee. However, unfortunately, that is not the determining factor in this matter. The evidence is uncontroverted that Holmes' physician determined that she had reached maximum medical improvement and released her to return to work with a number of restrictions and limitations. The evidence is also uncontroverted that Holmes' essential job functions as a Direct Care Specialist might require her to work below the knees, to squat, kneel, climb or crawl and to walk or lift. Although she has been performing the duties of that position with temporary restrictions, it is clear from the testimony that her supervisor never enforced those limitations.

DHS policy 2-1-7 includes medical limitations as a cause for disciplinary action when the medical limitations cause the inability to perform the essential functions of the position. (Appellee's Exhibit #24). The only evidence regarding Holmes' limitation was the medical release form which contained the limitations relied upon by Appellee, DHS. Appellant offered no evidence to refute that those limitations were not legitimate, and in fact, admitted that these were the limitations were imposed by her physician. The evidence also clearly indicated that the physical demands of direct care staff was

essential to care for the residents. The safety and well-being of the residents necessitate that the staff be physically able to properly care for the residents.

Based upon the entirety of the record, the undersigned finds that DHS has met its burden of proof that Holmes was unable to perform the essential job functions of her position and that just cause existed for the discipline of discharge. DHS based this decision on a finding that Holmes is unable to perform the essential job functions of a Direct Care Specialist due to her uncontroverted medical limitations. It is also clear that DHS exhausted all other options, including consideration of a reasonable accommodation and first preference for other positions, prior to taking this action. Given the nature of this action and Holmes' inability to perform the job, no other lesser form of discipline is available. As such, the discipline of discharge imposed herein is appropriate and was consistent with the progressive disciplinary procedure. Although the termination of a good employee is extremely unfortunate, the undersigned cannot reasonably find that the discipline imposed was unjust given all of the circumstances and Holmes' permanent restrictions and limitations. Therefore, DHS has proven, by a preponderance of the evidence, that the level of disciplinary action imposed was just.

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. Merit Rule 455:10-9-2 states that the Appellee DHS 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. Merit Rule 455:10-11-15 states that a permanent classified employee may be discharged for any of the reasons set forth in 455:10-11-14, which include

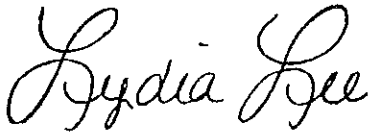
inability to perform the duties of the position in which employed or any other just cause.

5. DHS policy DHS:2-1-7(i)(3) states that inability to perform the essential functions of the position due to medical limitations will be considered cause for disciplinary action.
6. Holmes clearly is unable to perform the essential job functions of a Direct Care Specialist due to her uncontroverted medical limitations.
7. Appellee, DHS, has met its burden to prove, by a preponderance of the evidence that just cause exists to discipline Holmes for her inability to perform her essential job functions.
8. Appellee, DHS, has met its burden to prove, by a preponderance of the evidence, that because of the relevant circumstances of this case, discharge is an appropriate and just level of discipline. Further, no lesser forms of discipline are available or appropriate and therefore, the requirements of DHS' Progressive Disciplinary Policy are met.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition for appeal of Appellant Sheron Holmes, MPC 07-128 be **DENIED**.

This Order entered this 14th day of August, 2007.



Lydia Lee
Administrative Law Judge
Oklahoma Merit Protection Commission
3545 NW 58th Street, Suite 360
Oklahoma City, Oklahoma 73112