OKLAHOMA MERIT PROTECTION COMMISSION

STATE OF OKLAHOMA

ISSUED
OCT - 9 2007
OK MERIT PROTECTION COMM.
BY

TRACY MORELAND, Appellant	)	
vs.	)	CASE NO. MPC 08-002
OKLAHOMA DEPARTMENT OF VETERAN AFFAIRS Appellee.	)	

FINAL ORDER

Hearing on this matter was held before the undersigned duly appointed Administrative Law Judge on October 3, 2007, at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant, Tracy Moreland, appeared in person and was represented by Philip L. Watson, Esq. Appellee, Oklahoma Department of Veteran Affairs (hereinafter referred to as "ODVA" or "Appellee"), appeared by and through its Counsel, William F. O'Brien, Assistant Attorney General, and table representative, Cynthia Adams, Administrator, ODVA Claremore Center.

Appellant, a permanent classified employee of ODVA, was discharged from her position as Patient Care Assistant II (PCA II) at the Claremore Center for alleged patient abuse after allegations and two investigations found that Appellant violated ODVA SOP #713 Patient Abuse/Neglect in her handling of two patients at the Center.

Prior to the start of the evidentiary hearing, the undersigned admitted into evidence Joint Exhibits 1 through 9, and 11 through 13.

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, a Patient Care Assistant II (PCA II) at the Claremore Center, has been an employee of ODVA for four years, and a Certified Nurse Aid for a total of 13 years. As a PCA, Appellant is responsible for attending to the needs of the residents of the center, including providing direct and indirect non-professional nursing care of the residents, preparing residents for meals, and assisting them in their personal and oral hygiene. For the majority of her time with ODVA Appellant worked with dementia residents.

On Friday, May 11, 2007 Appellant and another PCA, Patty Boling, were working with a wheelchair dementia resident, Jack H. who had become agitated, had disconnected his catheter from its bag and was slinging urine around the hallway where he sat in his wheelchair. Appellant and Ms. Boling managed to restrain him and wheel him to his room to clean him up and change his clothes. Jack H. was uncooperative, combative, and loud, and while Appellant was bending down beside him to secure him in his wheelchair restraint after changing his clothes, he leaned forward in the wheelchair, struggling to bite Appellant. Appellant raised her hand to stop him, smacking his forehead with the palm of her hand, and said in an authoritative tone, "Stop it." Hearing the commotion, another PCA, Kami Robinson, entered the room during this process to give assistance and witnessed Appellant smack Jack H's forehead.

Two days later, on May 13, 2007, Appellant was again working with Kami Robinson and Patty Boling. While taking the residents to the dining hall Ms. Boling noticed that one of the residents, Jack C, was bleeding from his hand and informed Appellant. Appellant indicated that Jack C needed to be taken to the nurse to get his hand bandaged before he could go into the dining hall. Jack C, a very large, heavy-set dementia patient, protested leaving the dining room by planting his feet on the floor, preventing Ms. Boling from turning around his wheelchair. Appellant bent down to lift his feet from the floor so he could be turned in his wheelchair when Jack C began pounding on her back. She grabbed one of his wrists and held his arm down and behind the back of the wheelchair. Ms. Boling held his other arm down on the armrest and Jack C calmed down and allowed them to wheel him to the nurse's office. Again, Kami Robinson was present and observed the incident.

The following day both Kami Robinson and Patty Boling reported the May 11 and May 13, 2007 incidents to their charge nurse as alleged abuse by Appellant. Center Administrator Cynthia Adams named an internal three-person panel to investigate the matters and also reported the allegations to the Department of Human Services. The internal panel, composed of Helen Spray, LPC, Cynthia Schnell, assistant director of nursing, and Paul Call, assistant administrator of the center, investigated the two incidents, interviewed Appellant and the two witnessing PCA's as well as other staff, and on or about May 29, 2007 issued a conclusion that Appellant "is inappropriate when dealing with the residents", that her action with residents "borders on physical abuse," and that her employment should be terminated. (Joint Ex. 3)

Department of Human Services Long Term Care Investigator Jim Merritt was assigned to investigate the incidents. He reviewed the internal investigation file and

spoke with Kami Robinson, Patty Boling, Glenda Davenport, and Mary Knight, RN, but did not speak with Appellant[1]. Based on his investigation, Mr. Merritt found both allegations of abuse were substantiated.

Appellant was discharged effective June 7, 2007 for patient abuse, inefficiency, and failure and inability to perform the duties of her position, in violation of ODVA Standing Operating Procedure #713, *Patient Abuse/Neglect*, Merit Rule 455:10-11-14, *Causes for Discharge*, and Merit Rule 530:10-11-91, *Conduct of Classified Employees*. Appellant admits to the facts alleged, acknowledges that she should have handled the situations differently, but states that the punishment imposed – termination -- is too harsh. This administrative law judge agrees.

There was no evidence to imply that Appellant acted maliciously or with intent to harm or with disregard for the health or safety of the two subject residents. Neither was there evidence to imply that Appellant was mean-spirited or acted out or anger, rather than merely out of a desire to calm the residents and stop the behavior. On the contrary, the evidence indicates that Appellant acted to ensure the safety and health of the two residents as well as others. Jack H. had a highly contagious urinary track infection and was subject to throwing himself out of his wheelchair if he was not secured properly with a pelvic seatbelt. Appellant took immediate steps to ensure that Jack H did not contaminate others when he began slinging his catheter tubing. Even when he attempted to bite her, Appellant wanted to ensure that he was secure in his seat before stepping away from him. Jack C could not be taken where food was being served with

[1] Mr. Merritt testified that he called Appellant on more than one occasion and left messages, but she did not return his telephone calls.

an uncovered, bleeding wound -- both for his own protection as well as for the protection of others.

Also important, there was no indication that Appellant's actions caused either of the two residents any actual physical, mental or emotional pain, trauma, or discomfort. There was no evidence presented that either cried out in pain or complained of any soreness during or after the incidents, nor that their facial expressions indicated discomfort or pain during the incidents. In summary, there is no indication of any ill motive or intent or lack of control that led to Appellant's actions, and no indication of any harm to either of the two residents as a result of those actions. While neither fact excuses Appellant's behavior, both are important in determining what discipline is just for her violation of ODVA policy and procedure.

Appellant has worked at the Claremore center for four years. Her performance evaluations, from 2003 through 2006 (Joint Ex. #11), have consistently rated her as "meets standards" and indicate:

> "Tracy is very empathetic with residents, responds in a timely manner to residents requests ...Tracy is an excellent team worker."
>
> *September 28, 2006 PMP*

> "Tracy is a good worker, is observant of any changes in residents and reports promptly. Her time and attendance is good. . . . She has good rapport with staff and residents."
>
> *August 1, 2005 Mid-Year Review*

> "She has a good rapport with residents, she follows up on problems to assure they are resolved. Tracy is a good team worker, she needs to be more patient with new CNA's ... Tracy works hard and genuinely cares for the residents. She is pleasant with residents and co-workers. ... She gets frustrated when she is late completing [a] task. She becomes frustrated when new staff doesn't catch on to the routine as quickly as she thinks they should."
>
> *December 24, 2004 PMP*

"Tracy is hard working, gives good care, shows concern and compassion for the residents; she is a good team member, she is assertive with her leadership skills, her attendance is good; her attitude has improved."

September 10, 2004 PMP

"Tracy continues to meet or exceed all critical tasks. ...she has an excellent time and attendance record. ... Her natural take charge attitude tends to come across as being bossy."

February 20, 2004 Employee Service Evaluation Form

"Tracy is strong in the performance of her daily tasks and a highly motivated self starter. She is good with the patients and her work is done in a timely manner. However she needs to work on her ____, as sometimes in her eagerness to get her tasks done she sometimes comes across to others as bossy."

December 5, 2003 Employee Service Evaluation Form

Appellant's record indicates that she is a good employee, caring about the residents and about doing a good job; she is demanding of others as well as herself. Her record also indicates that Appellant gets along well with the residents and with her co-workers, but has little patience with employees who are not serious about doing a good job. Both her record and her co-workers agree that Appellant is naturally loud and assertive, and is sometimes seen as bossy. Good, caring employees are difficult to find in any business, but even more difficult, yet more important to find in the long-term care industry, where job tasks are often undesirable and the pay modest. Termination of any employee, particularly a good, caring employee with a spotless record, should be taken only as a last resort or in the most egregious of situations. While patient abuse is always a serious matter, this particular situation does not present as one in which termination is just.

CONCLUSIONS OF LAW

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

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

3. Merit Rule 530:10-11-91 requires that every classified employee fulfill the duties of her position to the best of her ability and behave at all times in a manner befitting the position.

4. 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.

5. ODVA Standing Operating Procedure #713, *Patient Abuse / Neglect,* recognizes as a basic right the right of patients residing in any Oklahoma State Veterans Center to live in an environment free of abuse.

6. ODVA Standing Operating Procedure #713, *Patient Abuse / Neglect,* provides that any act of patient abuse must be reported and investigated and if abuse is substantiated, appropriate action must be taken against the offending employee.

7. Appellee, Oklahoma Department of Veteran Affairs, has met its burden to prove, by a preponderance of the evidence, that Appellant, Tracy Moreland, violated ODVA Standing Operating Procedure #713, *Patient Abuse / Neglect,* and that just cause exists for discipline, but has failed to prove that discharge was appropriate or just under the circumstances of this case.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant is **GRANTED in part.** Oklahoma Department of Veteran Affairs' discharge of Appellant is overturned and changed to a 30-day suspension without pay.

IT IS FURTHER ORDERED that Appellant is immediately reinstated to the position she held before her discharge, with backpay and benefits, less the 30-day suspension without pay and less any pay or unemployment compensation received or earned by Appellant since her discharge. All agency files and records will be adjusted to conform with this Order.

DATED this 8th day of October, 2007.

Annita M. Bridges, OBA # 1119
Administrative Law Judge
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