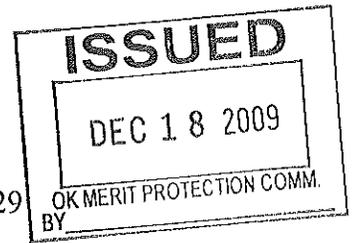


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION  
STATE OF OKLAHOMA**

DAVEY L. WHEELER, )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 OKLAHOMA DEPARTMENT OF )  
 VETERANS AFFAIRS, )  
 )  
 Appellee. )

Case No. MPC-10-029



**FINAL ORDER**

This matter came on for hearing before Jami J. Fenner, Administrative Law Judge, on December 7, 2009, at the Oklahoma Merit Protection Commission's office in Oklahoma City, Oklahoma. Appellant, Davey L. Wheeler, appeared in person and through his representative, Dorothy Pryor. Appellee, Oklahoma Department of Veterans Affairs ("ODVA"), appeared by and through its counsel, William O'Brien, Assistant Attorney General, and through the party-representative, Christy Howell.

Appellant, who was a permanent, classified employee of Appellee, appeals from an adverse disciplinary action of discharge. Additionally, Appellant alleges a violation of the Oklahoma Personnel Act or Merit Rules, claiming ODVA discharged Appellant for reasons other than those stated by the agency. The undersigned heard the sworn testimony of witnesses, viewed the exhibits admitted into evidence, and heard argument from Ms. Pryor and Mr. O'Brien. The undersigned admitted into evidence Appellee's Exhibit Nos. 1, 1A, 2, 3 and 4, and Appellant's Exhibit No. 5. After receiving all evidence and closing arguments, the undersigned closed the record on December 7, 2009.

Upon consideration of the record, the undersigned Administrative Law Judge issues the following findings of fact and conclusions of law pursuant to 74 O.S. § 840-6.7(B).

#### FINDINGS OF FACT

ODVA issued its "Discharge Notice" (Appellee's Exhibit 4) on June 29, 2009, signed by Thomas Walter, Interim Veterans Center Administrator, discharging Appellant effective June 29, 2009. At the time of the discharge, Appellant held the position of Linen & Clothing Specialist III.

According to the "Pre-Termination Hearing Notice" (Appellee's Exhibit 3) and the Discharge Notice, the grounds for ODVA's discharge of Appellant were inability to perform the duties of the position in which employed as provided in OAC 455:10-11-14.

The evidence showed, following an absence due to a work-related injury, Appellant returned to work for a short period of time (one to two days). ODVA sent Appellant home because he did not have a full release to return to work.

Subsequently, ODVA received a Workers' Compensation Form 5, Physician's Report on Release and Restrictions, regarding Appellant dated June 17, 2009, along with a Functional Capacity Evaluation ("FCE") Summary Report, dated May 20, 2009. (Appellee's Exhibits 1 & 1A). The Physician's Report states Appellant has permanent restrictions "as per FCE." Thomas M. "Mike" Walters, Acting Director of the Veterans Center at the time of Appellant's discharge, reviewed the information in the FCE report and the job description (Appellee's Exhibit 2) for Appellant's position. Based on Mr. Walter's interpretation of the FCE, Mr. Walters determined Appellant was not physically capable of performing the duties of his position because he could not perform each of the

duties for eight hours less two 15 minute breaks and one 30 minute break. Specifically, Mr. Walters relied on information in the FCE indicating Appellant could lift 90 pounds and perform axial rotation reach, kneeling reach, squatting reach, stooping reach, overhead reach and stair climbing on an "occasional" basis (defined as 0-33% of the work day). Based on Mr. Walters' conclusion, ODVA sent Appellant the Pre-Termination Hearing Notice.

However, ODVA presented no evidence Mr. Walters, who is a nurse and a licensed nursing home administrator, was qualified to or trained in administering or interpreting an FCE. Additionally, Mr. Walters' testimony that Appellant must be able to perform each of the job duties identified in the job description for the entire work day was not credible. If a person performs any one duty for eight hours, it obviously precludes doing any other duty. It is not possible to perform all work duties for the entire work day. Moreover, the job description itself states being on his feet is the only function Appellant must be able to perform for eight hours with two 15 minute and one 30 minute break. No time period is specified for any other function.

Randall Wallace, the physical therapist who performed the FCE, testified it is his opinion Appellant could perform the duties of the position as stated in the job description.

Frances Poindexter, the Human Resources Manager at the Norman Veterans Center, and Appellant each testified Appellant is receiving "disability" through the disability insurance provided to State employees. According to Ms. Poindexter, Appellant was approved to receive disability for the period from October 2008 through July 2009, but she did not know if it was short-term or long-term disability. ODVA did not present any evidence regarding what qualifies one for such disability, why Appellant was

approved for disability or what he is disabled from doing. Although it is possible Appellant is disabled from performing the duties of his position, the undersigned cannot speculate in that regard, and the testimony from Mr. Wallace indicates otherwise.

While ODVA did not establish just cause existed to discipline Appellant for inability to perform the duties of the position, it is unknown whether Appellant in fact could have performed his job duties from the date of his discharge to present. Additionally, the evidence showed Appellant has received some income from disability insurance for that time period. Thus, reinstatement without back pay or benefits is appropriate in this case.

Appellant's evidence did not show ODVA discharged Appellant for a reason other than that stated by ODVA. Nor did the evidence show ODVA violated the Personnel Act or Merit Rules with respect to Appellant.

Based on the record, ODVA did not meet its burden of proof that just cause existed for the discipline imposed. More specifically, ODVA did not show by a preponderance of the evidence that just cause existed to discipline Appellant for inability to perform the duties of the position in which employed. Appellant also failed to meet his burden of proof that ODVA committed a violation of the Personnel Act or Merit Rules.

#### CONCLUSIONS OF LAW

1. Any finding of fact that is properly a conclusion of law is hereby incorporated as a conclusion of law.
2. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause.

3. Under the Merit Rules, the burden of proof was on Appellee to show by a preponderance of the evidence that just cause existed for the adverse action and the discipline imposed was just. OAC 455:10-9-2(f)(1).

4. The burden of proof was on Appellant to show by a preponderance of the evidence that a violation within the Commission's jurisdiction occurred. OAC 455:10-9-2(f)(2).

5. A permanent, classified employee may be discharged for, among other things, misconduct, insubordination, inefficiency, inability to perform the duties of the position, willful violation of the Oklahoma Personnel Act or the Merit Rules, conduct unbecoming a public employee or any other just cause. OAC 455:10-11-14.

6. Appellee failed to meet its burden of proof that just cause existed to discipline Appellant for inability to perform the duties of the position.

7. Upon a finding that just cause did not exist for the adverse action, a presiding official may order reinstatement, with or without back pay and other benefits. OAC 455:10-9-2(f)(1)(B).

8. Reinstatement of Appellant without back pay or benefits is appropriate.

9. Appellant failed to meet his burden of proof that ODVA committed a violation of the Personnel Act or Merit Rules.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the appeal of Appellant, Davey L. Wheeler, from the adverse action of discharge is **SUSTAINED**.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Appellee shall reinstate Appellant to his position, effective December 28, 2009, without payment of back pay or benefits.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that the appeal of Appellant, alleging a violation of the Personnel Act or Merit Rules is NOT SUSTAINED.

Signed this 17<sup>th</sup> day of December, 2009.



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Jami J. Fenner  
Administrative Law Judge  
Oklahoma Merit Protection Commission  
3545 N.W. 58<sup>th</sup> Street  
Oklahoma City, OK 73112