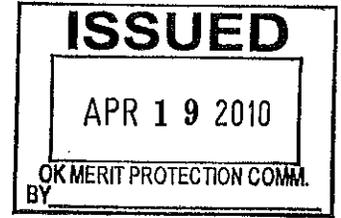


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION  
STATE OF OKLAHOMA**

**WANDA G. BRYCE,** )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 **DEPARTMENT OF HUMAN** )  
 **SERVICES,** )  
 )  
 Appellee. )

Case No. MPC 10-084



**FINAL ORDER**

This matter comes on for hearing on February 17, 18, March 1 and 16, 2010 before the undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Wanda G. Bryce (hereinafter “Bryce”), appears by and through her attorney, Daniel J. Gamino. The Appellee, Oklahoma Department of Human Services (hereinafter “DHS”), appears by and through counsel, John Douglas. Also present for Appellee was Table Representative, Kelley Knapp.

Appellant Bryce was a permanent, classified employee of DHS, appealing an adverse disciplinary action of discharge. Whereupon the hearing began and the sworn testimony of witnesses was presented, along with exhibits. Regarding the exhibits, the Appellee’s Exhibits 1 through 18, including SD 1 through SD21 and SD 23 through SD37 were admitted into the record and Appellant’s Exhibits E-4 through E-6, I1 though I-36, K-16, L, P3 through P29 and Q were admitted into the record. Accordingly, all exhibits presented and admitted are incorporated herein and made a part hereof.

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

1. Appellant, Wanda G. Bryce was a permanent, classified employee of the Appellee, Department of Human Services. She appeals an adverse action of discharge from her position as a Social Services Specialist II, effective August 26, 2009.
2. Bryce was previously disciplined in April, July, and September, 2007, and in August, 2008. The last disciplinary action in August, 2008 resulted in the implementation of a Corrective Action Plan (CAP). This CAP was deemed to be unsuccessful. The same events that were used in the CAP were also listed as grounds for the final disciplinary action herein.
3. On August 3, 2009, Bryce was notified of the Proposed Formal Disciplinary Action, stating DHS' intention to discharge her from her position. The stated causes for this proposed disciplinary action were "Unsatisfactory performance; Misconduct; Willful failure; Willful disobedience; Dishonesty – making false reports or claims; Discourteous treatment of clients, other employees, or the general public; Misuse of state property or equipment; and Neglect of duty. (Exhibit 1). There were 37 supporting documents attached to the Notice. (Exhibits SD -1 through SD-37).
4. A pre-termination hearing was scheduled and was held on August 12, 2009. Evidence and testimony was provided to support the numerous incidents listed in the Notice. The incidents occurred over a period of time from August, 2008 to June, 2009. The Hearing Officer, Gail Wettstein, found that the evidence supported the agency's alleged policy violations and warranted the proposed discharge.
5. On August 26, 2009, DHS gave Bryce notice of the final disciplinary action, discharging her from her position effective August 26, 2009. (Exhibit 4). Bryce timely appealed the disciplinary action and this proceeding was held.
6. From August through December, 2008, Bryce was absent from work for extended periods of time due to a previous disciplinary action, an absence related to the death of a family member and FMLA leave. These absences coincided with the CAP time period and resulted in an extension of the CAP. The CAP period was determined to be August 25, 2008 through December 8, 2008. Bryce's supervisor, Linda Henderson, completed the CAP evaluation. It was dated January 21, 2009, but was not completed until April 15, 2009.

7. The parties are in agreement that Bryce has a diagnosis that qualifies her as a qualified individual with a disability under the Americans with Disabilities Act (ADA). In September, 2008, Bryce submitted a request for reasonable accommodations, along with appropriate medical documentation. Bryce's disability results in her having emotional mood swings and being forgetful and easily distracted. Bryce and DHS engaged in an Interactive Process, which resulted in a Reasonable Accommodation agreement, dated October 10, 2008. (Exhibit 14). Several critical provisions provided in the agreement were not implemented by DHS until May or June, 2009, namely the "white noise" machine and the Back to Basics manual. In addition, the agreement provided that it would be evaluated in six months, or in April, 2009, which was also never done.

8. At the close of DHS' case in chief, the allegations of violations of policy relating to Misconduct, Willful Failure, Willful disobedience, Dishonesty, Discourteous treatment and Misuse of property were dismissed. The violations based upon Unsatisfactory performance were proven by DHS. The preponderance of the evidence supports DHS' allegations concerning unsatisfactory performance. Bryce is unable to meet the time and accuracy standards set for her position. Bryce appears to continue to need an inordinate amount of assistance to do the essential functions of her position. Bryce has been previously disciplined for unsatisfactory performance.

9. Despite her performance deficiencies, DHS entered into a reasonable accommodation agreement which provided a number of accommodations to assist Bryce considering her disability. Among these accommodations are agreements to provide reduced distractions and sending separate e-mails for each case with specific information, including instructions and deadlines. It also included an agreement for Bryce's supervisor to conduct monthly conferences utilizing her OPM-111 as a guide and to provide conference notes, and also to remind her of meetings and deadlines by e-mail. These accommodations seem to place a huge burden on Bryce's supervisor, but DHS made this agreement and is, therefore, bound by its terms. The evidence was not sufficient that these accommodations were utilized consistently and appropriately. It was clear from the testimony that Ms. Henderson (and others) were skeptical of Bryce's health problems and indifferent to the idiosyncrasies of her disability.

10. The reasonable accommodation agreement also imposes certain requirements on Bryce such as providing the appropriate ADM-1 forms for absences and turning in her cases at least five days in advance to have them read by her supervisor. She must be able to meet these requirements, as well as the time and accuracy standards applicable to her position.

11. DHS, once it granted the reasonable accommodations, had an obligation to act in accordance with the agreement and then to fairly and in good faith evaluate the effectiveness of those accommodations. DHS' efforts to shift the burden to Bryce to implement the agreement are misplaced. Again, having agreed to provide certain things, DHS bears the responsibility to provide those things or to amend the agreement appropriately.

12. According to the testimony of Linda Henderson, the decision was made to proceed to terminate Bryce in early April, 2009. This was prior to the six month accommodation agreement evaluation period, prior to furnishing her the white noise machine, and prior to providing her a Back to Basics manual. The majority of the incidents that this disciplinary action is based upon occurred in or before April, 2009. The record fails to indicate that DHS properly considered the appropriate mitigating circumstances in this disciplinary action.

13. It is uncertain from the entirety of the evidence that Bryce will be able to perform the essential functions of her job, even with these accommodations. However, as a permanent, classified employee, she is entitled to the reasonable opportunity to utilize the proffered accommodations in an attempt to perform satisfactorily.

14. The performance rating process is designed to establish a dialogue between the supervisor and the employee so that expectations, by way of accountabilities and behaviors, are discussed and understood. These evaluations are a fundamental step in addressing performance related problems. Unfortunately, these evaluations were not submitted and are not part of the record. It is impossible to address whether these have been used appropriately as a mitigating circumstance.

14. Bryce's extended absences, her disability and the lack of opportunity to utilize all of the reasonable accommodations were not properly documented or considered as mitigating circumstances in determining the appropriate level of discipline to be imposed.

## ISSUES

1. Was there just cause for the discipline imposed by DHS as set forth in its Notice of Final Discipline?
2. If so, was the discipline imposed just and appropriate under the circumstances?

## CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause. 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. Title 74 O.S. §840-6.5 and OAC 455:10-9-2 state 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. Title 74 O.S. §840-6.5, OAC 455:10-11-14 and OAC 455:10-11-17 state that a permanent classified employee may be discharged for any reason set forth therein, including inefficiency and inability to perform his or her duties, or any other just cause.
5. The preponderance of the evidence shows that there are numerous instances of Bryce's unsatisfactory performance and failure to meet the time and accuracy standards prescribed for her duties. This unsatisfactory performance resulted in "inefficiency" and inability to perform her duties and just cause to impose discipline.
6. Appellee, DHS, has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Bryce for her "Unsatisfactory performance" as a result of her failure to meet the time and accuracy standards and her appeal on that ground is denied.
7. Appellee, DHS, has failed to meet its burden to prove, by a preponderance of the evidence, that the actions of Bryce constituted "Misconduct, Willful Failure, Willful disobedience, Dishonesty, Discourteous treatment and Misuse of property" and her appeal on those grounds is sustained.
8. Appellee, DHS, and Appellant, Bryce, entered into a Reasonable Accommodation agreement, dated October 10, 2008. Appellee, DHS, once it granted the reasonable

accommodations, had an obligation to act in accordance with the agreement and then to fairly and in good faith evaluate the effectiveness of those accommodations.

9. Reasonable accommodation is always prospective and cannot be used to excuse past misconduct or performance deficiencies.<sup>1</sup>

10. Reasonable accommodations do not include rescinding of discipline otherwise warranted and an employer can hold all employees to the same performance standards.<sup>2</sup>

11. The evidence failed to demonstrate that Bryce was given a fair and appropriate opportunity to utilize the reasonable accommodations granted to her by DHS in order to improve her performance and perform the essential functions of her job in an acceptable manner.

12. DHS' position that the accommodation agreement was amended by agreement is rejected. Evidence of such oral agreement is subject to the parol evidence rule and inadmissible. The written agreement of October 10, 2008 was in force and operative, and subsequent evidence of a contemporaneous oral agreement is subject to the parol evidence rule and inadmissible. *Bredouw v. Jones*, 1966 OK 93, 431 P.2d 413.

13. Appellee, DHS, has failed to meet its burden to prove, by a preponderance of the evidence, that the discipline imposed was just under the circumstances considering the mitigating circumstances. The discipline imposed is unduly harsh and unfair given the totality of the evidence as provided herein. Given Bryce's previous disciplinary record, formal discipline in the form of a thirty (30) day suspension without pay, is an appropriate next step in the progressive discipline process and is just and appropriate.

## **ORDER**

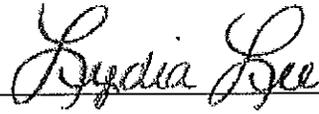
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant WANDA G. BRYCE, MPC 10-084 be SUSTAINED IN PART. The discipline imposed upon Appellant is reduced to thirty (30) day suspension without pay consistent with this Order. Appellant is to be restored to her previous position with all pay and benefits withheld as a result of this disciplinary action. Appellant's personnel records are to be expunged of all records except those consistent with this Order.

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<sup>1</sup> *Davila v. Qwest Corp.*, 2004 U.S. App. LEXIS 19020 (10<sup>th</sup> Cir. 2004) (unpublished)

<sup>2</sup> EEOC Compliance Manual §915.002

This Order entered this 29<sup>th</sup> day of March, 2010<sup>3</sup>.

A handwritten signature in cursive script that reads "Lydia Lee". The signature is written in black ink and is positioned above a horizontal line.

Lydia Lee  
Administrative Law Judge

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<sup>3</sup> Due to an electronic filing error, this Order is reissued on April 13, 2010.