

OKLAHOMA MERIT PROTECTION COMMISSION

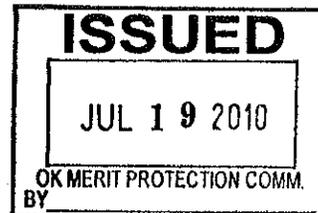
STATE OF OKLAHOMA

SUSAN D. FORD,  
Appellant

vs.

DEPARTMENT OF HUMAN SERVICES,  
Appellee.

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CASE NO. MPC 10-183

ORDER

Hearing on this matter was held before the undersigned duly appointed Administrative Law Judge on June 17, 2010, and on July 1, 2010 at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant, Susan D. Ford, appeared in person and was represented by Eric Edwards, Esq. Appellee, Department of Human Services (hereinafter referred to as "DHS" or "Appellee"), appeared by and through its counsel, John Douglas, Assistant General Counsel, and table representative, Lorinda Shelite, Human Resource Management Specialist III at Northern Oklahoma Resource Center in Enid, Oklahoma (hereinafter referred to as "NORCE").

Appellant, a permanent classified employee of Appellee, was discharged from her position as a Direct Care Specialist II at NORCE for alleged client abuse and verbal abuse in violation of DHS: 2-1-7(i)(2) Misconduct, (H) Discourteous treatment of clients, other employees, and the general public, and DHS: 2-1-7(7) Maltreatment of OKDHS clients.

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 is a Direct Care Specialist (DCS) II at the Northern Oklahoma Resource Center, in Enid (NORCE), where she has been employed since 2005. NORCE is a residential and habilitative facility for people with severe or profound mental retardation as well as other disabilities. According to the Oklahoma DHS official website, the primary mission of NORCE is to provide services that enhance the development of all individuals served and to provide opportunities that promote personal growth and independence. ([www.okdhs.org](http://www.okdhs.org)) As a direct care specialist at NORCE, Appellant is responsible for ensuring that all the daily needs of her assigned residents are met, from grooming and hygiene to providing active treatment by following prescribed steps in the Client Record and the Individual Habilitation Plan, and adhering to the Daily Activity Schedule. Appellant has consistently received Overall Performance Ratings of "Exceeds Standards" on her annual performance evaluations or PMP's (Appellee Exhibit 8 and Appellant Exhibit 4)

On May 29, 2009 Appellant was working with residents in Chickasaw Unit 2. Gloriajean Ortiz, a DCS trainee, was assigned to shadow Appellant that day, as part of her required training before she was eligible to have her own assigned residents. At approximately 11:45 am Appellant was conducting the "check and change" of her residents. At this time, residents are encouraged to use the restroom and, if needed,

the DCS will change any protective underwear or outer garment. One of Appellant's residents, SS<sup>1</sup>, was lounging on the couch in the living room area of the unit. Appellant directed her to get up and go to the bathroom. SS did not comply, and began barking and making loud noises.

SS is diagnosed as having severe mental retardation, severe mixed seizure disorder, and severe receptive/expressive language disorder, among other things. (Appellee Exhibit 2-3) She is required to wear a protective helmet to keep from injuring herself when she has seizures. The helmet is similar to a bicycle helmet or batter's helmet, with a hard outer shell and cushioned inside, and a chin strap that snaps to a rubber loop on the side of the helmet near the ear. (Appellee Exhibit 7-16) SS is described as often uncooperative and difficult to manage.

When SS failed to get up as directed, Appellant grabbed her by the rubber loop on her helmet and yanked her off the couch. Appellant then walked behind SS shoving her in her back toward the restroom.<sup>2</sup> (Testimony of Gloriajean Ortiz; Appellee Exhibit 7-5)

On July 1, 2009 Ms. Ortiz reported the May 29, 2009 incident to Independent Living Instructor Dana Kennedy, who told her to document the incident in writing, which she did. (Appellee Exhibit 7-5) After interviewing others who might have witnessed the incident, Appellee referred the matter to the Office of Client Advocacy (OCA) for further investigation. (Appellee Exhibit 7-1) OCA found that Appellant had committed abuse

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<sup>1</sup> Prior to the start of this hearing, the undersigned signed a Protective Order to protect the privacy of residential clients and their information. For that reason, the resident referenced in this matter will remain anonymous and will be referred to throughout this Order only as "SS".

<sup>2</sup> There was a second incident reported concerning Appellant and SS that occurred in the dining room at mealtime. This incident was investigated but was not included as a basis for the disciplinary action taken by Appellee against Appellant and, therefore, will not be discussed here.

and verbal abuse and referred the matter to the District Attorney for possible criminal prosecution. (Appellee Exhibit 2)

Notice of Proposed Formal Discipline (termination) was issued to Appellant on August 26, 2009. (Appellee Exhibit 1) A pre-termination hearing was held November 19, 2009 in which the hearing officer found that Appellant had violated agency policy by her actions on May 29, 2009, but also found that termination was not warranted. (Appellee Exhibit 4-27) This was Appellant's second disciplinary action in which a confirmed finding of abuse was made. In 2007 Appellant was suspended without pay for twenty (20) hours after an investigation found verbal abuse by Appellant. In spite of the hearing officer's recommendation of discipline short of discharge, Appellant was discharged from her position at NORCE, effective December 15, 2009. (Appellee Exhibit 4-1) Appellant filed this appeal.

### **DISCUSSION**

Appellant denies that the reported incident of May 29, 2009 occurred. She describes this case as the word of one new, inexperienced employee, who at one point recanted and apologized, against the word of an experienced, caring, hard-working valued employee with consistently outstanding performance as a DCS. Appellant suggests that Ms. Ortiz, as a new employee, tried to fit in with her co-workers by making up the story about Appellant, and points to the fact that she waited three days before reporting the incident as indication that it was not true. This administrative law judge disagrees.

The fact that Ms. Ortiz was new and inexperienced has no bearing on her veracity. If anything, her newness, perhaps, kept her from turning her head away from inappropriate behavior and dismissing it as "business as usual" or "just the way things are". Ms. Ortiz testified that her hesitancy in reporting the incident was due in part to the new employee training she had received where she was told that she should be careful who she trusted. She felt intimidated by Appellant's manner, which all witnesses described as loud, boisterous, and subject to interpretation as angry and intimidating. Also, as a new employee, Ms. Ortiz didn't want to be seen as a snitch and be ostracized by her co-workers. Ms. Ortiz' hesitancy to report Appellant is understandable and her fear of ostracism was reasonable. In most work settings there is a natural reluctance to report or point the finger at a co-worker for his or her behavior. NORCE is no different. Four witnesses confirmed this through their testimony. Dana Kennedy, Independent Living Instructor, testified that it is not unusual for a new employee to be hesitant and feel intimidated about reporting improper behavior of a co-worker. Supervisor Quinshella Crites cited two examples of staff attitudes toward reporting improper behavior: (1) Everyone knows that DCS Margaret Rucker does not pull her weight on the unit, and that others carry their load and most of hers, yet no one is willing to file a complaint. (2) Appellant herself is unpopular with some staff members because she has reported them for inappropriate behavior. Ms. Crites stated that often NORCE staff members think they will be shunned or given the silent treatment for reporting co-workers. DCS I Shannon Davis testified that she has been approached by co-workers and encouraged to say that she never saw Appellant do anything inappropriate. Appellant herself testified that she was told that she would "have a bulls-eye on her

back" for reporting inappropriate behavior by senior staff. Given the environment at NORCE, it is quite reasonable that Ms. Ortiz was hesitant to report Appellant.

Appellant makes much of the fact that no one other than Ms. Ortiz saw Appellant pull Client "SS" off the couch on May 26, 2009 by yanking her helmet. However the only other person who might have been in a position to see this was DCS Margaret Rucker, who was in the living room at the time. Ms. Rucker testified that she was busy with her own clients and paid no attention to what Appellant was doing. With no other eye-witness to the incident, other relevant evidence must be considered. Witnesses for both Appellant and Appellee testified that Appellant is a good worker – hard-working, carries more than her own work load, is caring of the clients, and takes special care with them that other DCS workers often will not do. Appellant's PMP's reflect this, as well.

On the other hand, Appellant's work is not completely stellar. Shannon Davis, DCS I, testified that over the past two years she has observed Appellant, on several occasions, use the rubber loop on client "SS's" helmet to pull her off the couch. Although she was aware this was not the proper method for assisting clients in getting off the couch when they do not want to cooperate, she did not report this, she said, because she did not think it caused client "SS" any harm. Additionally, Ms. Kennedy testified that she had worked with Appellant for over two years. While Appellant is a very good worker and great with most of the clients, Ms. Kennedy has observed that Appellant appears more irritated and aggravated with client "SS" than with any of the other clients. She suggested to OCA Investigator Taryn Wade that client "SS" be reassigned from Appellant's group to another group. (Appellee Exhibit 2-4).

Finally, in weighing the veracity of witnesses, the fact-finder must consider possible motivation or personal gain for each witness in testifying as they did. Appellant's motivation is clear. She is seeking to retain her position with Appellee. If she is believed, she wins. Ms. Ortiz gains no benefit from testifying as she did.<sup>3</sup> On the contrary, she risks ostracism from her co-workers and being labeled a snitch. Likewise, Ms. Davis risks not only ostracism from co-workers, but also disciplinary action for her failure to report Appellant's client abuse at the time it occurred.<sup>4</sup>

Considering all the evidence presented in this case, this Administrative Law Judge finds that Appellee has proven by a preponderance of the evidence that Appellant violated DHS policies DHS: 2-1-7(i)(2), Misconduct, DHS: 2-1-7(i)(2)(H), Discourteous treatment of clients, other employees or the general public, and DHS: 2-1-7(i)(7), Maltreatment of OKDHS clients by abuse and that just cause exists for discipline of Appellant. Appellant argues that the pre-termination administrative hearing officer's recommendation for a lesser discipline than discharge should be followed. However, the pre-termination recommendation is but one factor that the appointing authority must consider in rendering her decision. This administrative law judge finds that there is no abuse of discretion by the appointing authority in imposing discharge and that discharge of Appellant was just under the totality of the circumstances.

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<sup>3</sup> Appellant has alleged that Ms. Ortiz recanted her accusation and apologized to Appellant in the presence of DCS Shelley Guthrie. Ms. Guthrie corroborated Appellant in this regard. Ms. Ortiz has denied that she said any such thing. In weighing all the evidence, it is more likely than not that the behavior reported was based on Ms. Ortiz's observation rather than her imagination.

<sup>4</sup> In fact, Ms. Davis did receive a disciplinary action for her failure to report Appellant's improper behavior.

## 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 suspended without pay 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) **Misconduct** states that an employee may be disciplined for misconduct, including any failure to comply with statute, policy, practice, directive, standard, or procedure directly governing performance and conduct.

5. DHS:2-1-7(i)(2)(H) **Discourteous treatment of clients, other employees, or the general public** states that all staff are responsible for treating all persons with courtesy and respect and for ensuring that procedures used in carrying out their responsibilities do not violate privacy or personal dignity, constitute harassment, or violate constitutional rights.

6. DHS:2-1-7(i)(7) **Maltreatment of OKDHS clients** states that an employee may be disciplined for abuse, neglect, verbal abuse, exploitation, caretaker misconduct, sexual abuse, and sexual exploitation of clients.

7. OAC 340:2-3-2 defines "Abuse" as permitting or causing the infliction of physical pain, injury, sexual abuse, sexual exploitation, unreasonable restraint or confinement or mental anguish;...

8. OAC 340:2-3-2 (14) defines "Verbal Abuse" as the use of words, sounds, or other communication including but not limited to gestures, actions, or behaviors, by a caretaker or other person providing services to a vulnerable adult that are likely to cause a reasonable person to experience humiliation, intimidation, fear, shame, or degradation.

9. OAC 340:2-3-12(c)(1) states that (A) a first offense of abuse, sexual abuse, or neglect may result in discharge, demotion, suspension without pay, or other discipline deemed reasonable depending on the severity of the incident. and (B) a second offense results in discharge, unless the OKDHS Director approves a less severe penalty.

10. Appellee, Department of Human Services, has met its burden to prove, by a preponderance of the evidence, that Appellant, Susan D. Ford, has violated DHS: 2-1-7(i)(2), Misconduct, DHS: 2-1-7(i)(2)(H), Discourteous treatment of clients, other employees or the general public, and DHS: 2-1-7(i)(7), Maltreatment of OKDHS clients by her behavior toward Client "SS" on May 29, 2009, and that just cause exists for Appellant's discharge.

**ORDER**

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** by the undersigned Administrative Law Judge that the petition of Appellant is hereby **DENIED** and the discharge is sustained.

DATED this <sup>19<sup>th</sup></sup>~~15<sup>th</sup>~~ day of July, 2010.



Annita M. Bridges, OBA # ~~1410~~  
Administrative Law Judge  
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