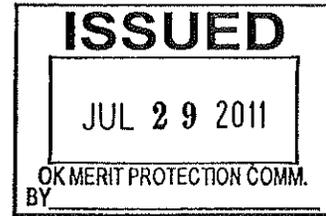


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

Steven Kuntz,)
Appellant,)
)
-v-) MPC No. 11-092
Oklahoma Department of Veteran)
Affairs,)
)
Appellee.)



FINAL ORDER

Hearing on this matter was held July 6, 2011, before the duly appointed, undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. Present at the hearing was Appellant who was represented by legal counsel, Grant D. Sheperd. Present for Oklahoma Department of Veteran Affairs (hereinafter "ODVA" or "Appellee") was William O'Brian, Assistant Attorney General. Also present for Appellee was table representative Regeana McCracken.

At the beginning of the hearing, the parties presented a joint protective order which stated that all exhibits and documents that reference confidential information would only be used for purposes of this appeal.¹

In addition, the Merit Protection Commission Executive Director's Order of Dismissal filed May 16, 2011, was discussed and that Order is hereby incorporated into the record and attached to this Final Order as Administrative Law Judge Exhibit 2.

Lastly, Appellant's pending motion to strike witnesses and exhibits was overruled and Appellee's pending motion to strike witnesses was held to be moot since the witnesses in question were not present at the hearing. No other preliminary issues were presented and neither party invoked the rule of sequestration.

¹ A copy of that protective order is attached to this Final Order as Administrative Law Judge Exhibit 1.

At the conclusion of the hearing, the parties were given additional time to submit a summary of witness testimony and exhibits which would be designated as protected under the protective order referenced above. The undersigned reviewed the summary and thereafter closed the record on July 18, 2011.²

Accordingly, after careful consideration of all the evidence, testimony, and exhibits the undersigned Administrative Law Judge issues the following findings of facts, conclusions of law, and order.

FINDINGS OF FACT

Appellant was a licensed Practical Nurse, Level 2, Y12B working at the Lawton-Fort Sill Veterans Center (hereinafter “the Center” or “the Facility”) at the time of his discharge in October, 2010.

The reasons for Appellant’s discharge are as follows: on September 22, 2010, Certified Medication Aid Hazel Spriggs was working at the Center on the same unit as Appellant. A third employee asked Appellant about employee information on a fourth employee who was not present. Appellant stopped what he was doing, went to a computer, and accessed a list of employees and their personal information. Ms. Spriggs asked Appellant how he was able to access personal information of employees at which time Appellant logged off the computer and immediately left the unit. Appellant made no comment to Ms. Spriggs in response to her question about how he was able to access the information.

The next day, Ms. Spriggs reported to Human Resource Assistant Krystal McCardle that Appellant had accessed employee names, addresses, and telephone numbers; all confidential information. Ms. McCardle then went to the Center Administrator Regeana McCracken and reported the Appellant’s actions.

Thereafter, Ms. McCracken instructed the Central Office IT Administrator Shane Sealock to investigate the Appellants access to employee personal information. During the course of the investigation, Mr. Sealock found an April 24, 2010, email sent by Appellant to Carl Hogue, a Chaplin who worked at the Center as a part time volunteer.

² Testimony and exhibits agreed to by the parties to be designated as protected by the Protective Order are the testimony of Hazel Spriggs identifying a specific resident at the Center by name, exhibit 6, exhibit 11, exhibit 13, and exhibit 13a.

Appellant had copied a portion of a resident's medical record and included it in the email sent from Appellant's computer at the Center to Chaplin Hogue.³

Mr. Sealock also found that Appellant had attempted to access numerous facility files from his computer at the Center. Specifically, Appellant had opened the main server on August 9, 10, 16, 17, 24, 30 and September 10, 13, 14, 22 and 24, 2010, in an attempt to open different folders on the Lawton shared drive but was denied access because he was not authorized to access those files.

Appellant had tried at least 190 times to access various folders including human resource folders, folders containing care plans for residents, pharmacy folders, fire and safety folders, accounting folders, and others. Many times Appellant would try more than once to access the same file even though he was consistently denied access to that file.

In addition, a review of the Appellant's email records indicated that Appellant used the Center computers to print out medical information from the computerized patient records system ("CPRS") on numerous occasions regarding one particular resident at the Center.⁴

At the conclusion of the investigation, Administrator McCracken ordered that Appellant be placed on suspension with pay status. Ms. McCardle and Director of Nursing Jerome Espiritu were then instructed to go to Appellant's locker and conduct an inventory of the contents of that locker.

During that inventory, Ms. McCardle and Mr. Espiritu found over 300 sheets of LPN original assignment sheets which contained residents' confidential medical information including some of the residents social security numbers. The locker also contained waiver of treatment forms, treatment order details, mental health notes, social service program notes, social service quarterly summaries, care plan notes, nursing notes, pharmacy notes, and a medical history sheet and wound care notes on a specific resident. None of these residents had been assigned to Appellants care.

³ At this hearing, Chaplin Hogue testified that as a general rule he did not come into contact with any patient information when volunteering at the Center.

⁴ It is uncontroverted that Appellee provides email services for business purposes to all employees and all emails created, transmitted, and stored on the agency computer system are the property of the agency and subject to review by management.

Appellant's locker also contained an oxygen equipment attachment marked as "state property"⁵ and a bottle of sparkling white wine.⁶

Thereafter a pre-termination hearing was held for Appellant on October 8, 2010. At that time, Appellant presented no explanation as to his use of the Center computer, his possession of numerous patient files, or his access to employee information. When given the opportunity to submit information and evidence on his behalf, Appellant presented nothing and stated he had "nothing to say".

On October 15, 2010, the Appellant was notified he would be discharged from employment effective October 8, 2010.

At this hearing, Ms. McCardle testified that employee addresses and telephone numbers are confidential, are protected by state law, and only Human Resource employees, managers and supervisors are allowed access to that information. In addition, nursing staff are to leave all resident files on the unit and not remove those files from the unit.

Director Espiritu testified that he was Appellants direct supervisor and at no time was Appellant authorized to access, store or maintain residents' medical documents in Appellant's locker. Also, Appellant was not authorized to copied a portion of a residents medical record and include it in an email to Chaplin Hogue.

Lastly, Director Espiritu testified that when he gave Appellant notice of his suspension with pay, Appellant gave Director Espiritu an envelope containing additional nurses notes which Appellant had, without authorization, taken off of the Centers computer.⁷

CONCLUSIONS OF LAW

1. The Oklahoma Merit Protections Commission has jurisdiction over the parties and subject matter in the above entitled cause.
2. Any finding of fact which is probably a conclusion of law is incorporated herein as a conclusion of law.

⁵ Pictures of the numerous documents were taken and introduced at this hearing as well as an inventory list prepared by Ms. McCardle on October 1, 2010, of all of the items found in the Appellant's locker.

⁶ It is uncontroverted that employees are prohibited from having alcoholic beverages at the Center.

⁷ These documents were in addition to the documents retrieved from the Appellant's locker by Ms. McCardle and Mr. Espiritu.

3. OAC 455:10-9-2 states in part that the burden of proof shall be upon the appointing authority who must prove the case by a preponderance of the evidence and Appellee has met its burden of proof in part.

4. OAC 455: 10-11-14, **Causes for discharge, suspension without pay, or involuntary demotion** states in part that a permanent, classified employee may be discharged for, among other things, misconduct, insubordination, inefficiency, willful violation of the Oklahoma Personal Act or merit rules, conduct unbecoming a public employee or any other just cause.

5. OAC 530: 10-11-91 **Conduct of classified employees** states in pertinent part that every classified employee shall fulfill to the best of his or her abilities the duties of the office or position conferred upon the employee and shall behave at all times in a manner befitting the office or position that employee holds.

6. **ODVA Standing Operating Procedure 1303, HIPPA-Authorization to release individually identifiable or protected health information and accounting disclosures** states in part that the disclosure of individual identifiable health information or protected health information not specifically allowed in ODVA Form 1300 or as allowed for on the HIPPA Form ODVA 1301, will not be made without a signed release and authorization from the individual or legal representative. In addition, all information disclosed in accordance with an authorization will be logged on ODVA Form 1301A.

7. **ODVA Standing Operating Procedure 1411, Confidential and Proprietary Information** states in part that all confidential information utilized in the care of Oklahoma's Veterans is protected. Employees of the ODVA may receive and have access to information that is confidential in nature and employees are not to disclose any such confidential information to:

- a. Any other person in the organization unless there is a legitimate business reason for doing so or
- b. Any person outside the agency unless management has expressly stated that the information can be disclosed to that person. This obligation exists even after the employee leaves the agency.

8. **ODVA Standing Operating Procedure 1400, Information-HIPPA Security Policy** was put into effect to insure that the ODVA adheres to the requirements of all

federal, state and agency law, rules, regulations and policies which govern security and protect confidentiality, integrity and availability of protected health information, financial records or any electronic information necessary for the operation of the agency.

9. The “policy” as set forth in **ODVA Standing Operating Procedure 1400, Information-HIPPA Security Policy** states in part that the confidentiality of all information created or hosted by the ODVA is the responsibility of each employee of ODVA and the level of access in the ODVA Electronic Information System is determined by the administrator of each subdivision for each employee. Violation of SOP 1400 can lead to disciplinary action, up to and including termination of employment.

10. In **ODVA Standing Operating Procedure 1400, Information-HIPPA Security Policy**, “Information” is defined as “any data or knowledge collected, processed, stored, managed, transferred or disseminated by any method”.

11. **ODVA Standing Operating Procedure 1400, Information-HIPPA Security Policy, Internet** states that the ODVA has provided access to the Internet for employees to support the business purpose of the ODVA. Use of the Internet should not conflict with the primary business purpose of the ODVA or with applicable laws and regulations.

The ODVA’s connection to the Internet may not be used for the following activity: Employees are not authorized to use the Internet to transmit personal comments or statements through e-mail.

12. The undersigned finds that Appellee has met its burden of proof that:

A. Appellant disclosed confidential employee information to Ms. Spriggs on September 22, 2010, without legitimate business reason for doing so in violation of **ODVA Standing Operating Procedure 1411, Confidential and Proprietary Information**, OAC 455: 10-11-14, **Causes for discharge, suspension without pay, or involuntary demotion** and, OAC 530: 10-11-91 **Conduct of classified employees**.

B. Appellant used the Internet to transmit personal comments or statements through e-mail and disclosed individual identifiable health information and protected health information without a signed release and authorization from the resident or the residents’ legal representative and without management

permission to Chaplin Hogue, a person outside the agency, on April 24, 2010, in violation of **ODVA Standing Operating Procedure 1303, HIPPA-Authorization to release individually identifiable or protected health information and accounting disclosures, ODVA Standing Operating Procedure 1400, information-HIPPA Security Policy, ODVA Standing Operating Procedure 1411, Confidential and Proprietary Information, OAC 455: 10-11-14, Causes for discharge, suspension without pay, or involuntary demotion** and, **OAC 530: 10-11-91 Conduct of classified employees.**

C. Appellant had in his locker at the Center a bottle of sparkling white wine in violation of **OAC 455: 10-11-14, Causes for discharge, suspension without pay, or involuntary demotion** and, **OAC 530: 10-11-91 Conduct of classified employees.**

D. Appellant had in his locker at the Center, over 300 sheets of LPN original assignment sheets which contained residents' confidential medical information, waiver of treatment forms, treatment order details, mental health notes, social service program notes, social service quarterly summaries, care plan notes, nursing notes, pharmacy notes, a medical history sheet and a wound care note of varies residents of the Center who had not been assigned to Appellants care.

Appellee has met its burden of proof that this is a violation of **OAC 455: 10-11-14, Causes for discharge, suspension without pay, or involuntary demotion** and **OAC 530: 10-11-91 Conduct of classified employees.** Appellee has not met its burden of proof that this is a violation of **ODVA Standing Operating Procedure 1400, Information-HIPPA Security Policy.**

E. Appellant used the Center computers to print out medical information from the computerized patient records system ("CPRS") on numerous occasions regarding one particular resident at the Center. Appellee has met its burden of proof that this is a violation of **OAC 455: 10-11-14, Causes for discharge, suspension without pay, or involuntary demotion** and **OAC 530: 10-11-91 Conduct of classified employees.** Appellee has not met its burden of

proof that this is a violation of ODVA **Standing Operating Procedure 1400, Information-HIPPA Security Policy.**

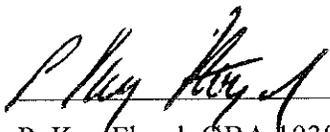
F. On August 9, 10, 16, 17, 24, 30 and September 10, 13, 14, 22 and 24, 2010, Appellant opened the main server at the Center and attempted to access various folders including human resource folders, folders containing care plans for residents, pharmacy folders, fire and safety folders, accounting folders, and others for non business purposes in violation of ODVA **Standing Operating Procedure 1400, information-HIPPA Security Policy, Internet, OAC 455: 10-11-14, Causes for discharge, suspension without pay, or involuntary demotion** and, OAC 530: 10-11-91 **Conduct of classified employees.**

Accordingly, the undersigned finds that Appellee has shown by a preponderance of the evidence presented at the hearing that just cause exists for the termination of the Appellant.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge the petition of Steven Kuntz vs. Oklahoma Department of Veteran Affairs, PMC-Case 11-092 be DENIED.

This Order entered July 28, 2011.



P. Kay Floyd, OBA 10300
Administrative Law Judge
Oklahoma Merit Protection Commission
3545 NW 58th St, Suite 360
Oklahoma City, OK 73112.
(405) 525-9144

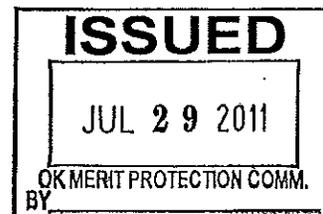
BEFORE THE MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

KUNTZ, STEVEN,
Appellant,

VS.

Case No. MPC 11-092

OKLAHOMA DEPARTMENT
OF VETERANS AFFAIRS,
Appellee.



PROTECTIVE ORDER

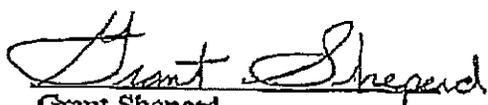
In recognition of the fact that the evidence presented in this appeal will involve confidential patient information that's confidentiality is required to be maintained by both state and federal law, it is ordered that all exhibits, documents that reference such information will only be used for the purpose of this appeal and will not be divulged to any parties, and that after the hearing is concluded they will be returned to the ODVA, and that the record of this proceeding that deals with such information will be sealed. It is further ordered that the no names of individual patients be used in this appeal by the parties, counsels, and witnesses, and that the patient's individual identification numbers will be used instead.

ALS Exhibit # 1

P. Kay Hord 7-6-2011
ADMINISTRATIVE LAW JUDGE



William O'Brien
Assistant Attorney General
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405.521.6099



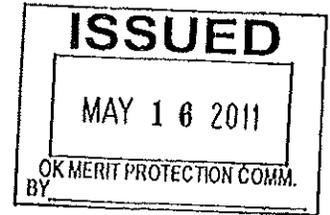
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BEFORE THE MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

MPC 11-092

Steven Kuntz v. Oklahoma Department of Veteran Affairs

EXECUTIVE DIRECTOR ORDER OF DISMISSAL



STATEMENT OF CASE

Appellant (Steven Kuntz) filed this appeal in accordance with 74:840-6.5 Demotion, suspension or discharge of classified employee - Notice - Appeal - Hearing - Findings and Title 74 O.S., Section 840-6.6, Violation of employee rights -- Appeals -- Investigations, alleging hostile work environment and violation of the Whistleblower Act.

Title 74-840-2.5 (B) (2), Whistleblower Act provides no officer or employee of any state agency shall prohibit or take disciplinary action against employees for: reporting a violation of the Oklahoma Constitution, state or federal law, rule or policy; mismanagement; a gross waste of public funds; an abuse of authority; or a substantial and specific danger to public health or safety. *(In relevant part)*

FINDINGS

Appellant states on September 28, 2010, an agency representative provided him a form to file a Formal Grievance. Appellant states a patient resident on the Red Wing at the ODVA facility is overtly rude and hostile toward him. Appellant contends the agency staff continues to subject him to a hostile work environment by not transferring him off the wing to prevent the hostile work environment.

On September 30, 2010, Appellant states he was questioned by the Director of Nursing and the House Supervisor regarding whether he copied printouts of medical information on one particular resident. Appellant states he said yes. Appellant said he explained that he put the printouts in his locker because he has seen nursing notes disappear and he was gathering information to file a grievance. Appellant states he was then placed on Suspension with pay pending an investigation for violating HIPAA laws. Appellant's Notice of Suspension indicated Appellant was restricted from entering the Lawton/Ft. Sill Veterans Center facility or grounds during his suspension unless specifically authorized.

Appellant states he was unable to file his Grievance until his Pre-Termination Hearing on October 8, 2010, due to his suspension.

Merit Rule 455:10-19-23 (b), Employee responsibility *(in relevant part)* provides any employee filing a formal grievance has a duty and responsibility to provide accurate, *timely* information to support his or her assertions. .

Merit Rule 455:10-19-42 (a), Filing time provides a formal grievance *shall be filed within 20 calendar days of the date of the act or incident; or within 20*

calendar days of the date the employee becomes aware of or, with reasonable effort, should have become aware of a grievable issue.

On October 20, 2010, Appellant states he received a "Notice of Final Action Discharge." On October 21, 2010, Appellant said he received a letter stating his grievance could not be resolved, because he was no longer an employee.

Appellee states the agency has no knowledge of Appellant trying to file a grievance prior to his pre-termination hearing. Appellee states Appellant's concerns relating to the resident were looked into prior to the agency receiving Appellant's grievance and during the course of Appellant's employment. Mr. Kuntz was moved to different wings to try to provide a remedy to his complaints. Appellee provided the following documentation:

- Copies of the Appellant's work wing assignments
- Grievance resolution letter

The Appellant's work wing assignments reveals Appellant *had not* worked on the Red Wing since January 2010. The Appellant's assignment has been in a float status.

The Grievance Resolution Letter was dated October 19, 2010, addressed to Appellant from Regeana McCracken, Administrator. McCracken said medical and nursing staff is responsible for providing care to 200 veterans with service connected disabilities. Many of the veterans have behavioral or psychological problems, which are being treated as part of their medical conditions. McCracken said the Appellant and all nursing staff have been trained on how to deal with difficult patients. *McCracken closed by stating Appellant's remedy as indicated in his grievance cannot be resolved because Appellant is no longer an employee of the facility. Therefore Appellant's grievance is dismissed.*

Through an investigative inquiry, the Appellant states the Appellee is in violation of Title 74:840-2.5 (B) (2).

Title 74-840-2.5 (B), Whistleblower Act - Disciplinary actions (in relevant part) provides no officer or employee of any state agency shall prohibit or take disciplinary action against employees of such agency, whether subject to the provisions of the Merit System or in unclassified service, for reporting a violation of the Oklahoma Constitution, state or federal law, rule or policy; *mismanagement*; a gross waste of public funds; an abuse of authority; or a substantial and specific danger to public health or safety;

Appellant states he was punished for trying to report mismanagement by Appellee when he was placed on Suspension, in order to prevent him from the ODVA grounds to file his grievance. Appellant states the grievance was based on agency staff continually sending him into the work wing where a patient verbally and physically assaulted him on different occasions.

Appellee states Appellant's discharge has nothing to do with his allegations of a hostile environment. Appellee states the agency received notice that Appellant was giving out personal information, which was located in a restricted folder on the shared drive. A request was made to the Agency IT to see if Appellant accessed the folders. It was confirmed that Appellant had been attempting to access several folders on the Shared drive along with an email written to a Chaplain from Appellant regarding a resident at the Lawton/Ft. Sill Veterans Center. Confidential information was retrieved from the Appellant's locker and the Appellant was placed on Suspension with pay. After Appellant's pre-termination hearing, he was terminated. Appellee provided the following documentation:

- Email request to the Central IT to check the Appellant's computer
- Notice of Suspension with pay.

DISCUSSION

It's Appellant's responsibility to make sure his grievance is filed timely, pursuant to Merit Rule 455:10-19-23 (b). Appellant's suspension noted that he was restricted from entering the facility. Appellant did not provide any reason why he could not file his grievance through the United States Postal Service.

Evidence shows Appellee accepted Appellant's grievance. Appellant's issue was not resolved, because Appellant was no longer an employee of the agency.

Merit Rule 455:10-19-42 (b), **Filing time** provides the appointing authority may extend the time limit for filing a formal grievance. *The decision to extend the filing time shall not automatically give jurisdiction of the issues in dispute to the Commission.*

Merit rule 455:10-1-2 Moot means when rendered, a decision could not have any practical effect on the existing dispute.

The evidence shows Appellant does not dispute he had confidential information in his locker. Appellant states he admitted to agency heads that he had printouts of medical information in his locker. Appellant was then suspended. *There is no evidence that the agency's reason to suspend Appellant is pretextual.*

Appellant's job Title is Licensed Practical Nurse, Level II Y11B. Appellant's Job Descriptor states Appellant is responsible for providing care to patients or clients for the Appellee. The Appellant's Wing assignment on the Red Wing was adjusted in efforts to resolve Appellant's concerns. Appointing Authorities have control of positions within their agency and have the authority to organize their agencies.

Merit Rule 530:10-5-3 (a), **Authority and responsibility of Appointing Authorities** provides Appointing Authorities have control of positions within their agency and have the authority to organize their agencies, to create positions,

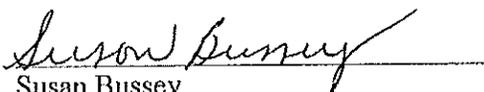
to abolish positions and to prescribe or change the duties and responsibilities assigned to any position or employee at any time.

CONCLUSIONS

Appellant did not file his alleged violation appeal with the Commission within twenty (20) calendar days of the alleged events pursuant to Merit Rule 455:10-3-1.1(1). Therefore, Merit Protection Commission does not have jurisdiction over the Appellant's alleged hostile work environment issue.

Additionally, there is no evidence to indicate that Appellee has violated the Whistleblower Act or that the Appellant was disciplined for reporting mismanagement under the Whistleblower Act.

In accordance with Merit Rule 455:10-3-13(a) (1) **Dismissal of appeals**, this appeal is dismissed due to insufficient evidence to support the allegations.



Susan Bussey
Executive Director
Oklahoma Merit Protection Commission
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Oklahoma City, Oklahoma 73112