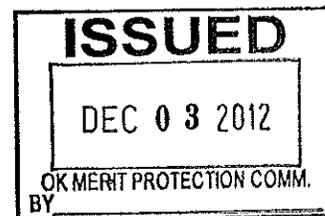


OKLAHOMA MERIT PROTECTION COMMISSION

STATE OF OKLAHOMA



CHERYL LYNN STRONG,)
Appellant)
vs.)
OKLAHOMA DEPARTMENT OF)
VETERAN AFFAIRS,)
Appellee.)

CASE NO. MPC 12-162

FINAL ORDER

Hearing on this matter was held before the undersigned duly appointed Administrative Law Judge on November 13, 2012 at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant Cheryl Strong, appeared in person and was represented by Daniel Gamino, Esq. Appellee, Oklahoma Department of Veteran Affairs (hereinafter referred to as "ODVA" or "Appellee"), appeared by and through its Counsel Gretchen Zumwalt-Smith, Assistant Attorney General, and agency representative Susan McClure, Human Resources Director.

Appellant, Cheryl Lynn Strong, Nurse Manager I at the Oklahoma Veterans Center in Norman was suspended without pay for three days for alleged patient neglect after failing to report an allegation of abuse of a resident by a senior patient care assistant.

Whereupon, the sworn testimony of witnesses for both Appellee and Appellant was presented, along with Exhibits, which were admitted and are incorporated herein

and made a part hereof. Accordingly, after 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 Cheryl Strong is a registered nurse shift supervisor on the 11 pm to 7 am shift on the Alzheimer unit (E1) of the Norman Oklahoma Veterans Center. On October 10, 2011 Senior Patient Care Assistant Tanya Spears sent an email to Appellant and RN Unit Manager Shannon McCullough indicating concern that another senior patient care assistant on the unit was being verbally and physically abusive to residents on E1. The email stated:

Hello Ladies:

First off, this is very hard for me to do. I have kept quiet about my concerns with Carl Metzger. I have spoken with Shannon and Mandy, and they suggested I e-mail you to let you know [sic] I how feel.

Carl is being rough with our residents and has yelled at them. It's like verbal abuse toward our guys. I have seen him push and shove our guys. ... The other aides on E-1, myself included, take our residents to the dining room for breakfast. Carl does not [sic] he leaves them in their rooms, locked down in their wheelchairs.

...

Joint Ex. 3, 10, and 11.

As shift supervisor, Appellant is the highest ranking person at the facility between 11 pm and 7 am. However, on October 10, 2011, on the day Tanya Spears' sent her email, Appellant was on vacation. She returned to work on October 12, 2011¹,

¹ Appellant maintained that she returned to work from annual leave on October 13, 2011. However, her time card indicates that she was on annual leave from October 6, 2011 through October 10, 2011; and that she returned to work on October 12, 2011 and worked from 10:21pm on October 12, 2011 to 7:18am on October 13, 2011. Joint Ex. 7

and saw Ms. Spears' email for the first time on the morning of October 13, 2011. Appellant responded to Ms. Spears by email at 2:22 am October 13, 2011, stating in pertinent part:

Thanks for letting me know. ... If Carl was abusive to the residents then we need to fill out [sic] a abuse report form so just let me know. Thanks Cheryl

Joint Ex 3, 11

Tanya Spears did not respond to Appellant's email, and Appellant called the E1 unit and left word with LPN Mandy Bise Cantwell that she wanted to talk with Tanya.

At 4:23am on October 13, 2011, two hours after Appellant's email to Tanya Spears, Mandy Bise Cantwell, LPN on the 11pm to 7am shift, wrote to Appellant:

Tanya sent me the email that she sent to you. She is worried she will be in trouble for all of this. She told me that she wants to sleep on it and will come file a formal complaint on it Fri. [10/14/2011] ... *I have heard Carl talking to the guys in a very hateful loud [sic] manor* but haven't actually seen any of the pushing.

(emphasis added); Joint Ex. 3, 12

Appellant responded to Ms. Cantwell's email at 4:43am the same day:

She will not be in trouble. I want to know if someone is abusing the residents and we need to file a report. Thanks for your help with this. Cheryl

Joint Ex. 3

Appellant made no further attempts to talk with Tanya Spears; nor did she follow-up with Mandy Bise Cantwell on her information that she, too, had "heard Carl talking to the guys in a very hateful loud" manner; nor did Appellant report this alleged verbal abuse to her superiors for follow-up or to the Department of Human Services (DHS) for investigation. In her "formal statement" concerning her failure to report abuse, Appellant states, "Tanya did not respond to that [Appellant's] email so I could gather the information I needed..." and "Tanya never responded or came to talk to me that night."

Joint Ex. 4.

Tanya Spears did not file a written report of the alleged abuse on Friday, October 14, 2011, as Mandy Bise Cantwell had reported she would. Appellant was on sick leave and did not work from October 15 through 26, 2011. On October 26, 2011 Center Administrator Christy Howell was on the unit in an unrelated investigation when RN Supervisor Shannon McCullough approached her and asked her to speak with Tanya Spears about her email of October 10, 2011. This was the first indication Administrator Howell had of the alleged abuse. The following day, October 27, 2011, an investigation of the alleged abuse was conducted by Administrative Programs Officer Michelle Sexton, who interviewed Appellant and ten other patient care employees on the Alzheimers' Unit, and concluded:

The preponderance of the evidence obtained from this investigation confirms that Carl Metzger is guilty of verbal abuse against residents in violation of at least the following rules, laws and regulations, all of which state generally that a resident has the right to be free from mental, physical, sexual, and verbal abuse or neglect, corporal punishment, and involuntary seclusion.

Joint Ex1, page 7.

A subsequent investigation was undertaken by the Department of Human Services (DHS) which found Appellant guilty of neglect of a resident by failing to protect him, and failing to follow agency policy and procedure concerning reporting allegations of resident abuse. Joint Ex. 2. Appellant was suspended without pay for three days for failing to report the alleged abuse, in violation of agency policy. Joint Ex. 6. This appeal followed.

Appellant argued (1) that she did not have time to pursue the abuse allegation as she was on vacation when the email was sent and worked only four days before she was out on sick leave for ten days; (2) that Ms. Spears refused to complete an abuse report form and Appellant did not have sufficient information to report the alleged abuse;

and (3) further suggested that the allegation may have been made simply to get the accused employee transferred off the Alzheimer Unit and replaced with another employee. This administrative law judge is not persuaded by Appellant's arguments.

The Oklahoma Department of Veteran Affairs recognizes the "basic inherent right of every American to live in an environment free of abuse, neglect, and exploitation" and recognizes that "[E]ach resident residing within one of the Oklahoma State Veterans Centers has actively participated in the promotion or defense of these basic rights." Joint Ex. 8, *Summary of Policy*. Abuse is a supremely serious matter in a facility charged with the care of vulnerable adults who cannot care for themselves; adults, such as our country's veterans, who have fought to keep us, our families, and generations that follow safe and able to sleep peacefully at night; adults who have risked life and limb in the protection of the ideals and freedoms upon which this country was founded and which are a way of life that many Americans take for granted; adults who are most deserving of our respect and admiration.

ODVA is serious about the prevention of abuse by its employees. The agency has promulgated a written Standard Operating Procedure (SOP) defining, preventing, reporting, and investigating patient abuse and neglect, which outlines individual responsibilities when abuse is suspected (Joint Ex. 8). The agency requires annual training and testing of this SOP for all patient care employees at agency facilities (Joint Ex. 13, pgs. 6-20). In addition to the agency SOP, the Norman Center has a Policy and Procedure for Abuse and/or Neglect, derived from the agency SOP, which is posted at the nurses' stations (Joint Ex. 13, pgs. 1-5).

Appellant was at work four days after having read the email from Tanya Spears' written days earlier, expressing her concerns about abuse by a fellow senior patient care assistant, and never put forth an effort to speak directly with Ms. Spears, choosing instead to communicate through email and through other employees. Appellant's assertion that a written abuse report was required in order for her to follow-up on the abuse allegation is disingenuous. The policy reference to a written statement indicates that "the statement will be written in the presence of the supervisor." Joint Ex. 8, pg. 5 and Joint Ex. 13, pg 2. Yet, Appellant, as supervisor, initiated no face-to-face contact with Tanya Spears, and made no effort to secure the written statement which was to be made in her presence, at any time during the four days that Appellant worked before she was out ill. Further, in her response to the proposed 5-day suspension, Appellant writes:

*I admire and care for our Veterans very much and I have always reported any allegation of abuse that was reported to me **verbally** or in a witness statement.*
(Emphasis added) Joint Ex. 18

Appellant's assertion now that she believed a written statement was required before she could report the abuse allegation is directly contradicted by her earlier written statement that she has always reported any verbal statement of abuse.

Appellant's suggestion that the abuse allegation may have been motivated by a desire to get the accused employee moved off the E-1 unit in favor of another employee is, perhaps, most telling about Appellant's state of mind and why she did not report the abuse allegation. Less than three months prior to the abuse allegation, Appellant made the decision to move the accused employee to the E-1 unit over another employee. (Appellant's Ex. 24) Apparently, all staff did not agree with this decision. (See: Joint Ex.

1, pg. 7, final paragraph, and Joint Ex. 10, Shannon McCulloch email to Appellant) It may be that Appellant felt defensive about her staffing decision and did not want to face the possibility that she had selected the wrong employee for the position. She stated to investigator Michelle Sexton that she had not had any complaints about the accused's patient care from employees or residents until the accused, rather than another employee, was chosen to go to the E-1 unit. (Joint Ex. 1, pg.1)² It is entirely conceivable that Appellant's defensiveness over her staffing decision blinded her to Tanya Spears' concerns (which were confirmed to her in part by Mandy Bise Cantwell). Rather, Appellant convinced herself that these were specious allegations made simply to discredit the accused employee -- and thus her staffing decision -- and led to Appellant's failure to take action she would otherwise have taken, had her mind not been so clouded.

Regardless of the speculation concerning Appellant's state of mind, Appellant's actions in this instance were not the actions worthy of a health care professional of her position, background, experience, and stature. Appellant is clearly held in high esteem by her colleagues and superiors, as exhibited by her PMP's and the notes she has received complimenting her professionalism. Nonetheless, Administrator Christy Howell stated it best when she said that she expects more from a supervisor than to say "fill out an abuse report form" when an allegation of abuse is made. In this instance, Appellant fell short of reasonable expectations in failing to properly handle the allegations of verbal abuse when they came to her attention.

² This suggests the possibility that Appellant has received other abuse complaints in addition to the one made by Tanya Spears, which Mandy Bise Cantwell confirmed as to the verbal abuse (Joint Ex. 3).

Appellee has proven, by a preponderance of the evidence, that Appellant violated agency policy concerning neglect when she received an allegation of patient abuse and failed to report it to the Administrator of the Norman Veterans Center or to DHS. Appellee has further shown that just cause exists for discipline to be imposed for Appellant's misconduct, and that the three-day suspension without pay is just under the circumstances.

CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and subject matter in the above-entitled matter.

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

3. Merit Rule 455:10-11-14 states that a permanent classified employee may be suspended without pay not to exceed sixty calendar days for misconduct, inefficiency, willful violation of the Oklahoma Personnel Act and Merit Rules, conduct unbecoming a public employee, and any other just cause.

4. Merit Rule 455:10-9-2(f)(1) 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 adverse action and that the discipline imposed was just.

5. ODVA SOP #713, **Patient Abuse/Neglect**, *Summary of Policy*, states that it shall be the responsibility of any individual person/employee having reasonable cause to believe that a vulnerable adult is suffering from maltreatment to report any suspected incident of abuse, neglect, or exploitation to their immediate supervisor and to provide

full cooperation to management and investigators. Failure to report and/or assist in an investigation involving resident abuse, neglect, or exploitation is cause for disciplinary action up to and including possible discharge.

6. ODVA SOP #713, **Patient Abuse/Neglect, Definitions**, defines Verbal Abuse as the use of words, sounds, or other communication including, but not limited to, gestures, actions, or behaviors that are likely to cause a reasonable person to experience humiliation, intimidation, fear, shame or degradation.

7. ODVA SOP #713, **Patient Abuse/Neglect, Definitions**, defines Neglect as a lack of proper care or attention in the performance of assigned duties. This includes the failure to provide protection for a vulnerable adult with shelter, nutrition, health care, or clothing, or negligent acts or omissions that result in harm or the unreasonable risk of harm to the resident through the action inaction, or lack of supervision by a caretaker.

8. ODVA SOP #713, **Patient Abuse/Neglect, Protection of Alleged Victims of Abuse**, requires the Administrator or designee to take immediate action to protect the resident from harm when abuse is suspected or reported.

9. ODVA SOP #713, **Patient Abuse/Neglect, Reporting**, states that it is the responsibility of each employee of ODVA to promptly report any suspected incident of abuse and requires a written statement, written at the time of the verbal report, and written in the presence of the supervisor. **Even if written statements are not provided immediately, it is the responsibility of the supervisor to immediately report any allegation to the Administrator or designee.** (*emphasis in original*)

10. Appellee, Oklahoma Department of Veterans Affairs, has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Appellant

Cheryl Lynn Strong when she failed to report the allegation she received concerning patient abuse by a senior patient care assistant under her supervision.

11. Appellee, Oklahoma Department of Veterans Affairs, has met its burden to prove, by a preponderance of the evidence, that the discipline imposed – three-day suspension without pay – was just under the circumstances.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the undersigned Administrative Hearing Officer that the petition of Appellant is hereby **DENIED**.

DATED: this 30th day of November, 2012.



Annita M. Bridges, OBA # 1119
Administrative Law Judge
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