

OKLAHOMA MERIT PROTECTION COMMISSION

STATE OF OKLAHOMA

BRIAN M. WRIGHT,)
Appellant)
vs.) CASE NO. MPC 13-035
DEPARTMENT OF HUMAN SERVICES,)
Appellee.)

FINAL ORDER

Hearing on this matter was held before the undersigned duly appointed Administrative Law Judge on April 19, 2013 at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant, Brian Wright, appeared in person, *pro se*. Appellee, Department of Human Services (hereinafter referred to as "DHS" or "Appellee"), appeared by and through its counsel, Richard A. Resetaritz, Assistant General Counsel, and table representative, Elizabeth Hodgen, Assistant Administrator at the Southern Oklahoma Resource Center.

Appellant, a permanent classified employee of Appellee, was discharged from his position as a Direct Care Specialist (hereinafter referred to as "DCS") II at the Southern Oklahoma Resource Center in Pauls Valley, OK (hereinafter referred to as "SORC") for violation of DHS: 2-1-7(i)(2)(E) Insubordination, DHS: 2-1-7(i)(2)(H) Discourteous treatment of clients, other employees, or the general public; and DHS:2-1-7(i)(5) Conduct unbecoming a public employee, after alleged explosive and threatening outbursts against supervisors on three separate occasions.

Appellant filed this appeal denying just cause for his discharge and alleging that Appellee violated state and/or federal laws, including the Whistleblower Act and the Open Records Act. At the prehearing conference in this matter, the undersigned directed the parties to address the alleged violation issues in prehearing briefs and those briefs are considered as part of the record in this case.

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, along with the parties pretrial briefs. Accordingly, after careful consideration of all evidence, testimony, exhibits, and arguments, 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 Southern Oklahoma Resource Center (SORC) in Pauls Valley, Oklahoma, where he has worked for eight years. Appellant's wife is also an employee at SORC. SORC is a residential and rehabilitative facility, classified as an intermediate care facility for persons with mental retardation (ICF/MR).¹ The majority of the 120 persons who live at SORC have severe or profound intellectual disabilities as well as other disabling conditions. The primary mission of the center is to provide services that enhance the development of each individual and to provide opportunities that promote personal growth and independence.²

¹ More recently referred to as an *intermediate care facility for individuals with intellectual disabilities* (ICF/IID).

² www.okdhs/developmentaldisabilities/resourcecenters.org

Effective August 22, 2012 Appellant was discharged for insubordination, discourteous treatment of other employees, and conduct unbecoming a public employee based on three separate verbal altercations with staff. For many months prior to his discharge, Appellant had continually demanded to see the supervisory staffing log book. This is a log book that contains a record of: employees scheduled to work who call in sick, employees on leave and what kind of leave they are taking, notes concerning employee family emergencies, as well as client medical appointments, diagnostic tests, and other medical information. The log book also contains information about who is on the volunteer list for overtime for each shift.

Appellant maintains that since all employees are required to volunteer for overtime, he needs to know what hours are available, eg. where there are *holes* in the schedule caused by unscheduled absences, so that he and his wife can volunteer to work the same shifts. Prior to October 2011 schedules were printed weekly and indicated who was actually working, not just who was scheduled to work. In October 2011, Appellant indicates, weekly postings were changed to monthly schedule postings, indicating those employees scheduled to work throughout the month.

Appellant has maintained that the supervisory staffing log book is an open record and that he is entitled to see it. However, because the staffing log book contains personal information about employees and their families, and medical information about clients, Appellant was denied access to the log book. This has led to altercations between Appellant and his supervisors for which he has previously been disciplined.³

³ In March 2012 Appellant received a five-day suspension without pay for willful disobedience, insubordination, discourteous treatment of clients, other employees or the general public, and conduct unbecoming a public employee based in part on his interactions with supervisors.

Supervisors Dixie Iser (DCS III) and Robin Thomas (DCS III) both testified that on July 7, 2012 they were in the supervisor's office when Appellant entered and asked if the policy had changed and if he could now see the staffing book. Ms. Iser testified that when told that HIPPA laws and privacy laws prevented staff from access to the book, Appellant's voice became elevated and angry, and he asserted that they were breaking the law and violating his rights by not allowing him to see the staffing book. Ms. Thomas testified that Appellant left the office stating "You are breaking the law and you all can go to jail." (*See also*: Jt. Exhibits 4 and 5.)

On July 8, 2012 at approximately 7:25 a.m., Supervisors Dixie Iser, Appellant's supervisor, and Aaron Wardwell (DCS III) were conferring in the supervisor's office during shift change, when they heard Appellant coming down the hall yelling that his wife had a right to be on the hall visiting a client. Earlier that morning Supervisor Iser had seen Michelle Wright, Appellant's wife, talking with Appellant on the unit and notified Ms. Wright's supervisor. Ms. Wright was assigned to a different unit and "cottage hopping" is not allowed at SORC. Also, this was during a peak client care time when staff members are busy assisting residents in getting up in the morning and getting dressed. Appellant stormed into the office yelling at Ms. Iser. Ms. Iser indicated that Appellant was angry and shaking, his face was red, and he was breathing hard. He entered her office, slammed a piece of paper on her desk, demanding she read it, and leaned over the desk, yelling, inches from her face. Supervisor Wardwell described Appellant as "beet red", pointing his finger in Ms. Iser's face almost touching her nose; at one point he began hitting the desk with his fist and waving the paper he had with him in her face, telling her to "Read this. You're breaking the law. Read this." (Joint Exhibit

3) Eventually Appellant's wife came into the office and led Appellant out. Mr. Wardwell said in his written statement, "I think that if Michelle was not at the end of the desk that he was so mad that he would have hit Dixie." (Joint Exhibit 3) Ms. Iser testified that she thought Appellant might try to hit her because of his body language, leaning over the desk and in her face.

On July 12, 2012 Supervisor Robin Thomas saw a notice posted by Appellant on the bulletin board referring to an "open book law" that supervisors were violating. At the bottom of the notice it stated in large letters "Supervisors are breaking the law and should go to jail." Ms. Thomas took down the notice. Appellant approached her angrily, yelling that he had a right to post the law, that all employees had a right to know the law and demanded that she never remove anything he posted. He snatched the notice from her hand and posted it again, and again Ms. Thomas removed it. Appellant moved closer to Ms. Thomas, shouting in her face. Appellant admitted stating to supervisor Thomas that he didn't care how many times his postings were removed, he would continue posting them because the staff had a right to know. Ms. Thomas testified that she felt intimidated and threatened by Appellant; that Appellant was extremely angry and appeared out of control. Ms. Thomas believed Appellant might hit her. (Joint Exhibit 8) Because of Appellant's continued loud, threatening, and intimidating manner, Ms. Thomas advised Unit Manager Adele Anderson, DCS V, that she felt threatened by Appellant and that SORC had become a hostile work environment. (Joint Exhibit 8)

As a result of Appellant's behavior on July 7, 8, and 12, 2012, he received a Notice of Proposed Disciplinary Action – Discharge, dated July 24, 2012. (Joint Exhibit 2) A pre-termination hearing was held August 8, 2012 before Hearing Officer Gail

Wettstein in which she found reasonable grounds to believe Appellant violated policies on insubordination, discourteous treatment of other employees, and conduct unbecoming a public employee. (Joint Exhibit 13) Appellant was discharged from his position as DCS II at SORC effective August 22, 2012 (Joint Exhibit 11), and filed this appeal with the MPC alleging that Appellee did not have just cause to discharge him, and also alleging that Appellee violated his rights under the Oklahoma Personnel Act or the Merit Rules.

Appellant has alleged that his rights have been violated under the Oklahoma Open Records Act, 21 OS §24A.2-5, under the Nursing Home Care Act, 63 OS § 1-1906 *et.seq.*, under the Whistleblower Act, OS § 840-2.5, and under the Oklahoma Personnel Act, Section 6: Grievances and Discipline, 74 OS § 840-6.1 – 6.3.

Appellant alleges that DHS violated the Open Records Act by refusing to allow him access to the staffing log book, although he acknowledged that he never filed a written request pursuant to the Act and also acknowledges that the staffing log book contains private confidential employee and client information.

Nonetheless, Appellant argues, the Nursing Home Care Act provides “exceptions” requiring the release of such information without a specific written request. Further, he states, the Nursing Home Care Act requires nursing facilities to post the names and titles of direct care nursing staff daily for each shift, and the monthly postings at SORC do not meet this requirement. Compliance with the Nursing Home Care Act falls within the jurisdiction of the Oklahoma Department of Health, which provides periodic inspections of facilities to ensure such compliance. Determination of

compliance with the Nursing Home Care Act is beyond the jurisdiction of the Merit Protection Commission and this Administrative Law Judge.⁴

Appellant alleges that his discharge violated the Whistleblower Act – that he was discharged for posting information concerning behavior by his supervisors that he believed was unlawful, and for his beliefs and opinions. The facts do not support these allegations. It was not his beliefs and opinions, but rather his actions that led to Appellant’s discharge. He also alleges that Appellee violated his rights under the Merit Rules by refusing to resolve the matter concerning his viewing of the staffing log book at the lowest possible level. Again, the facts do not support these allegations. This matter had been resolved, as his supervisors repeatedly had advised him that privacy and HIPPA laws prohibit him from viewing the log book. The fact is that Appellant did not like this resolution. It is clear that Appellant does not consider this matter “resolved” unless or until he receives the answer he wants. The Merit Rules provide procedures that an employee may use to appeal agency decisions that adversely impact that employee. Appellant chose not to avail himself of these procedures, but rather to engage in insubordinate and inappropriate behavior.

Appellant has failed to prove, by a preponderance of the evidence, that his rights under state or federal law were violated, or that his discharge was a pretext for protected action under the Whistleblower Act. On the other hand, Appellee has proven, by a preponderance of the evidence, that Appellant’s actions on July 7, 8, and 12, 2012 violated DHS: 2-1-7(i)(2)(E) Insubordination, DHS: 2-1-7(i)(2)(H) Discourteous treatment of clients, other employees, or the general public; and DHS:2-1-7(i)(5) Conduct

⁴ This ALJ takes judicial note, however, that 42 CFR §483.5 defines nursing facility, and specifically excludes “an institution for individuals with intellectual disabilities or persons with related conditions...”

unbecoming a public employee, by his explosive and threatening outbursts against supervisors, and has further proven that just cause exists for his discharge.

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 discharged for misconduct, willful violation of Merit Rules, conduct unbecoming a public employee, and any other just cause.

3. 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 the action taken.

4. Merit Rule 455:10-9-2(f)(2) states that the Appellant bears the burden of proof in an alleged violation appeal and must prove by a preponderance of the evidence that a violation of agency rule or state or federal law within the Commission's jurisdiction did occur.

5. DHS:2-1-7(i)(2) **Misconduct**, states that an employee may be disciplined for misconduct, including **(E) Insubordination and (H) Discourteous treatment of clients, other employees, or the general public.**

6. DHS:2-1-7(i)(5) **Conduct unbecoming an employee**, states that an employee may be disciplined for any failure by the employee of good behavior either during or outside duty hours, which is of such a nature that it causes discredit to OKDHS.

7. 42 OS §840-2.5, the Whistleblower Act, prohibits disciplinary action against an employee for disclosing public information to correct what the employee reasonably believes evidences a violation of the Oklahoma Constitution or law or a rule promulgated pursuant to law, or for reporting a violation of law or the Oklahoma Constitution.

7. Appellee, Department of Human Services, has met its burden to prove, by a preponderance of the evidence, that Appellant, Brian Wright, has violated DHS: 2-1-7(i)(2) Misconduct, (E) Insubordination, and (H) Discourteous treatment of clients, other employees, or the general public, and DHS:2-1-7(i)(5) Conduct unbecoming a public employee, for his actions on July 7, July 8, and 12, 2012, and that just cause exists for Appellant's discharge.

8. Appellant, Brian Wright, has failed to meet his burden to prove, by a preponderance of the evidence, that Appellee Department of Human Services has violated any agency rule or state or federal law, including violation of the Open Records Act and the Whistleblower Act.

ORDER

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

DATED this 2nd day of May, 2013.

A handwritten signature in cursive script, appearing to read "Annita M. Bridges". The signature is written in black ink and is positioned above a horizontal line.

Annita M. Bridges, OBA # 1119
Administrative Law Judge
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