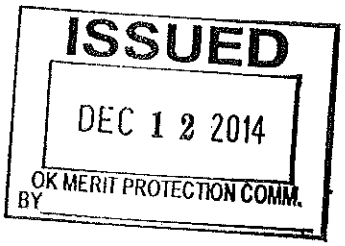
BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

ROBERT M. DUCKERT,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. MPC-14-043
	)	
OKLAHOMA DEPARTMENT OF VETERANS AFFAIRS	)	
	)	
Appellee.	)	



FINAL ORDER

This matter came on for hearing before R. Scott Thompson, Administrative Law Judge, on November 4, 5 and 24, 2014, at the Oklahoma Merit Protection Commission's office in Oklahoma City, Oklahoma. Appellant Robert M. Duckert ("Appellant") appeared in person and through his counsel, Gary Eaton. Appellee Oklahoma Department of Veterans Affairs ("ODVA"), appeared through its counsel, Kara Smith, and through party-representative, Tim Potteiger.

Appellant was a permanent, classified employee of Appellee, appealing from an adverse disciplinary action of discharge. The undersigned heard the sworn testimony of witnesses, viewed the exhibits admitted into evidence, and heard argument from counsel. The undersigned admitted into evidence Joint Exhibit Nos. 1-15, Appellee's Exhibit Nos. 1, 2, 5-7, 9, 10, portions of Exhibit 11 and Appellant's Exhibit Nos. 2-7, 9, 11. After receiving all evidence and counsels' closing arguments, the undersigned closed the record on November 24, 2014.

Upon consideration of the record, the undersigned Administrative Law Judge issues the following findings of fact and conclusions of law pursuant to 74 O.S. § 840-6.7(B).

FINDINGS OF FACT

Appellant testified he has worked for ODVA from January 1, 2003, through September 23, 2013. At the time of his discharge, Appellant held the position of Recreational Therapist IV assigned to the Claremore Veterans Center in Claremore, Oklahoma. He had held that position since January 1, 2006. On August 7, 2013, ODVA issued a "Notice of Pre-Termination Hearing-Discharge," ("Notice") notifying Appellant that ODVA was considering termination of Appellant's employment. (Joint Exhibit 2). Administrator of the Claremore Veterans Center, Tim Potteiger, conducted a pre-termination hearing, and sent a letter to Appellant, terminating his employment effective September 23, 2013. (Joint Exhibit 1).

According to the Notice and the letter terminating Appellant's employment ("Letter"), the basis for the adverse action was ODVA SOP#200 entitled "Progressive Discipline and Adverse Actions," (Joint Exhibit 13), Merit Rule 455-10-11-14 and Merit Rule 530:10-11-91. The Notice and Letter state Appellant had prior discipline in the form of a letter of reprimand on June 13, 2013 (Joint Exhibit 5), a verbal warning on August 30, 2011 (Joint Exhibit 6), and corrective counseling on February 8, 2010. *See* OAC 455:10-11-17(c)(5). As an initial matter, with respect to the previous discipline, the undersigned has reviewed the previous discipline and finds that neither the verbal warning nor corrective counseling are relevant to this inquiry. They are unrelated temporally, occurred before Potteiger assumed his position and involve matters wholly unrelated to the issues herein.

The Notice and Letter are detailed and explicit regarding the circumstances that were considered in the determination regarding Appellant. Although there was a significant amount of evidence regarding other matters, the undersigned will confine the review to the matters considered by Potteiger as outlined in the Notice and Letter.

A. The Fourteen Program Changes

The Notice and Letter state that Potteiger provided Appellant with a list of fourteen (14) program changes he wanted implemented on May 14, 2013. He wanted these changes implemented by June 1, 2013. Appellant and Monique DiLonardo, a consultant hired by Potteiger in April 2013, prepared a Quality Assurance Plan in early June. (Joint Exhibit 8). Although there was disputed evidence about how much of the Plan had been implemented by July 11, 2011, the date Appellant was suspended with pay (Joint Exhibit 3), the testimony presented by the witnesses indicated that some, but not all of the points had been implemented by that date. Others were not due to be completed until a date later than that. It is also clear that some of the points were ultimately implemented, if at all, long after Appellant's termination.

The undersigned finds that Appellant had made an effort to respond to the fourteen points and to begin implementing the Quality Assurance Plan. It is clear from the evidence that the June 1, 2013, deadline was unreasonable. Moreover, ODVA failed to establish that the progress made by Appellant in the short time between the issuance of the Quality Assurance Plan and his suspension with pay was insufficient under the circumstances.

B. Meeting on June 10, 2013

The Notice and Letter describe a meeting between Appellant, Potteiger and Assistant Administrator Cindy Rogers. According to the Notice, Potteiger raised several issues at this meeting. First, Potteiger noted that assessments had not been taken of residents. This was an issue included within the Quality Assurance Plan prepared a few days before. The assessments were to be completed by December 2013. Potteiger also noted Appellant had failed to find coverage for activities for an employee on vacation. Finally, Potteiger stated he again reiterated to Appellant he needed to turn over Unit 3B's activities to another employee.

The assessment issue was addressed by the Quality Assurance Plan. However, the latter two issues were not. Appellant was clearly resistant, by his own testimony, to transferring responsibility for 3B to one of his subordinates. Both of these issues are indicative of Appellant's difficulty in managing his department.

C. Request for Vacation

ODVA uses Appellant's request for vacation at the time ODVA was dealing with the issues relating to the VA report as indicative of Appellant's failure to put job considerations before personal considerations. ODVA has failed to prove that Appellant's usual annual request for leave rises to the level of conduct supporting discipline.

D. June 18, 2013

The Notice and Letter state that on June 18, 2013, Appellant a representative from Blue Star Mothers called and Appellant failed to return the call. The Notice further states that other employees have reported to Potteiger that Appellant does not return calls. No competent evidence on these matters was proffered by ODVA.

E. June 19, 2013

The Notice and Letter refer to an email exchange between DiLonardo and Appellant. DiLonardo expressed concerns about the evaluations being done twice a week as set out in the Quality Assurance Plan. Appellant informed her he would be off that Friday and that DiLonardo could fill in for him. DiLonardo only came in on Fridays. Again, ODVA implies that Appellant taking leave indicates a lack of interest in proper performance of his job. ODVA has not demonstrated this exchange supports discipline.

F. July 9, 2013 – Owasso Cub Scouts

The evidence presented established that a fishing event planned with the Owasso Cub

Scouts did not go forward due to the lack of bait. There was contradictory testimony regarding whether the event had staff coverage and whether the recreation department or the Cub Scouts were supposed to bring bait. ODVA has not proven this charge.

G. Scheduled events not being held

There was a significant amount of testimony regarding whether the events shown on the calendar were, in fact, being held. Potteiger and others at his direction audited various events to determine whether all events were being held as scheduled. There was conflicting evidence concerning whether certain events had been held despite the claim of the audit they had not. It is clear from the testimony that at least some of the scheduled events were not held.

H. Activities folder

A folder marked "Activities" was mistakenly placed by Potteiger in his outbox. The folder was not marked as belonging to Potteiger. His assistant delivered it to Appellant, apparently assuming the proper place for an "Activities" folder was with the head of the recreation department. Appellant took the folder home with him to review and gave it to his mother to copy. When Potteiger realized the mistake, he and staff members acting at his direction asked for Appellant to return it. There was a delay in returning the folder because Appellant had removed it from the facility. Ultimately, Appellant was escorted by another employee to meet his mother to obtain and then return the folder.

The various witnesses testifying about this incident were unable to establish an uncontested timeline of events, although the incident appears to have occurred over a day or two. There was also conflicting testimony regarding whether the folder contained Protected Health Information ("PHI"). There was testimony that ODVA policy required PHI to remain at the facility. There was no evidence that ODVA policy prohibited removing activities-related

information that did not contain PHI from the facility. The contents of the folder were not provided to the undersigned to review. It is therefore unclear whether the folder contained PHI or not.

ODVA has not met its burden of demonstrating that Appellant removed PHI in violation of ODVA policy. Moreover, ODVA has not met its burden of proving the delay in returning the folder was the result of insubordination.

I. The VA Survey

The most significant issues raised by the Notice and Letter are related to the deficiencies described by the VA in its inspection of the facility. (Appellee's Ex. 2) Although the survey was released to the ODVA on or about July 17, 2013, the preliminary results were disclosed several weeks prior to that date. (Joint Ex. 12).

ODVA consistently referred to the relevant portion of the VA inspection report (Appellee Ex. 2) as twenty-nine (29) pages of deficiencies. This description is highly misleading. The inspection report is in the form of a spreadsheet with nine columns. Column three is the rating, which for the activities department was "Not met." Column four is for "Explanatory Statements." That column is only wide enough for 6-10 words. Moreover, many of the findings listed in this column are findings related to the patients surveyed. For each patient identified, the explanation contains a lengthy recitation about the patient's overall physical and mental well-being and the care plan in place for each patient. Thus, much of the information provided in the notes does not actually address the deficiencies.

In addition, a review of the notes demonstrates two primary concerns raised by VA. First, residents were not being properly assessed to determine an individualized activity plan for them. Second, the department was woefully inadequate in providing activities for those who are unable

to travel to activities scheduled outside their rooms. Both of these issues, particularly the assessments, were addressed by the Quality Assurance Plan developed after the notice of the deficiencies, but before the written report.

Once the deficiencies were received, the facility was required to develop a corrective action plan. Appellant was tasked with drafting that plan and given a deadline. The Notice and Letter claim no response had been provided to Potteiger by June 28, 2013. However, the evidence showed that a response, although deemed to be inadequate by Potteiger, was provided on that date. (Appellant Exhibit 5).

A meeting to discuss the VA survey was set between Potteiger and Appellant for July 1, 2013. Appellant failed to show, claiming to be ill. The meeting was reset for later that day and Appellant arrived late. Potteiger claims he told Appellant the response was not sufficient, directed Appellant to the Nursing Home Care Act and planned to meet the next day. Appellant did not show for that meeting. Appellant was asked to respond by July 11, 2013. He said he would respond by July 19, 2013. Appellant contradicts some of these facts, however, the testimony and evidence has persuaded the undersigned that Appellant's testimony he had no meetings about the corrective action plan is not credible. Appellant does admit his response was provided beyond the time set by Potteiger.

Potteiger and DiLonardo completed the corrective action plan and submitted it to VA. There was no evidence of the contents of the plan, nor whether any of Appellant's response was incorporated into it. Appellant was suspended with pay on July 11, 2013, and did not work any more days at the facility.

J. SOP #200

Appellant asserts ODVA failed to follow its progressive discipline policy with respect to

its handling of Appellant. Specifically, Appellant put on unrebutted testimony that Appellant was not given any informal discipline, memorialized on ODVA Form 210, before proceeding to formal discipline. ODVA responds by stating only that SOP #200 allows it to skip steps in progressive discipline when appropriate and it was appropriate here.

Given the nature of the issues within the letter of reprimand, informal discipline might well have been appropriate before issuance of a letter of reprimand. However, that issue should have been raised by appealing the letter of reprimand. It was at that point that a concern about skipping the steps of informal discipline and moving directly to formal discipline was ripe. Appeals must be filed within twenty (20) days of the adverse action. Merit Rule 455:10-3-1.1(2). The letter of reprimand was issued on June 13, 2013. This appeal was filed on August 26, 2013. The filing was well beyond the time to challenge the issuance of the letter of reprimand.

K. Overall performance

The Notice and Letter base Appellant's termination in part on Merit Rule 455-10-11-14 which states in pertinent part: "Any employee in the classified service may be discharged . . . for misconduct, insubordination, inefficiency, habitual drunkenness, inability to perform the duties of the position in which employed, willful violation of the Oklahoma Personnel Act or of the rules prescribed by the Office of Personnel Management or by the Oklahoma Merit Protection Commission, conduct unbecoming a public employee, conviction of a crime involving moral turpitude, or any other just cause." The undersigned finds that ODVA has failed to carry its burden with respect to misconduct, insubordination, drunkenness, willful violation of the law, conduct unbecoming or conviction of a crime of moral turpitude. However, it is still necessary to determine whether ODVA's evidence related to Appellant's job performance meets the burden of demonstrating inefficiency, inability to perform duties or other just cause.

There was a significant amount of evidence and testimony regarding Appellant's performance of his job duties. Despite being a department head for years, Appellant testified he still was unfamiliar with applicable regulations. He did not know how to write a corrective action plan and took no steps to educate himself in order to do an appropriate job once he was assigned to draft one. There was considerable evidence that he did not adequately supervise employees, manage the department sufficiently or manage his time well. These issues had been called to his attention numerous times. (Joint Exhibits 1, 2, 4, 5, 7, 9, 10, 11, Appellee's Exhibits 6, 7, 9, 11; Appellant's Exhibit 7).

SOP #200 states that if an employee's unacceptable performance continues, more severe action in the form of Suspension without Pay, Involuntary Demotion or Discharge should be considered. (Joint Exhibit 13). Here, clearly suspension without pay fails to address the problem. It is possible a voluntary demotion could have been an appropriate remedy. However, neither ODVA nor Appellant provided any evidence of a position within the facility that would be an acceptable position for Appellant's experience and skill set. Accordingly, there is no basis upon which to order an involuntary demotion.

Based on a preponderance of the evidence, the undersigned Administrative Law Judge finds just cause existed to discipline Appellant and the discipline imposed was appropriate under the circumstances.

CONCLUSIONS OF LAW

1. Any finding of fact that is properly a conclusion of law is hereby incorporated as a conclusion of law.

2. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause.

3. The burden of proof in this matter was on Appellee to show by a preponderance of the evidence that just cause existed for the adverse action and the discipline imposed was just. 74 O.S. § 840-6.5(C); OAC 455:10-9-2.

4. An appointing authority is required to establish a written progressive discipline policy designed to ensure consistency, impartiality and predictability with penalties ranging from informal discipline to formal discipline, up to discharge. 74 O.S. § 840-6.3; OAC 455:10-11-4 – 455:10-11-11.

5. Absent mitigating circumstances, repetition of an offense generally is accompanied by progression to the next higher level of discipline, but, dependent on the circumstances, a single incident may justify proceeding to a higher step before going through the lower steps. OAC 455:10-11-4.

6. An agency may impose formal discipline on an employee to correct violations of statute, rule, policy, practice or procedure regarding work performance or behavior. OAC 455:10-11-11.

7. An agency may discharge, suspend without pay for period not to exceed 60 days, or demote a permanent, classified employee for, among other things, misconduct, insubordination, inefficiency, inability to perform the duties of the position, willful violation of the Oklahoma Personnel Act or the Merit Rules, conduct unbecoming a public employee or any other just cause. OAC 455:10-11-14.

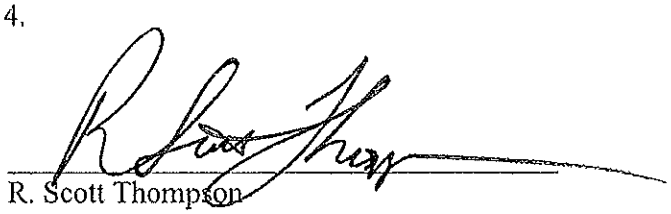
8. Appellee met its burden of proof that just cause existed to discipline Appellant for violating Merit Rule 455:10-11-14. Appellee has demonstrated Appellant's inefficiency and inability to perform the duties of the position.

9. Appellee met its burden of proof that just cause existed for formal discipline.

10. Appellee has met its burden of proof that the discipline imposed – discharge – was appropriate.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the decision of the Oklahoma Department of Veterans Affairs to discharge Appellant is affirmed and Appellant's appeal is hereby **NOT SUSTAINED**.

Signed this 9th day of December, 2014.



R. Scott Thompson
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