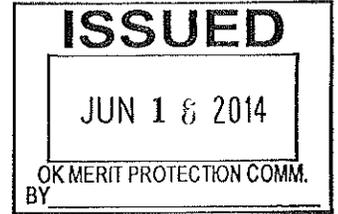


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

TAMMY NEWMAN,)
Appellant,)
)
v.)
)
OKLAHOMA DEPARTMENT)
OF CORRECTIONS,)
Appellee.)
)

Case No. MPC 14-107



FINAL ORDER

This matter comes on for hearing on May 29, 2014 before the duly appointed, undersigned Administrative Law Judge (hereinafter “ALJ”) at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Tammy Newman, (hereinafter “Newman”), appears personally and through counsel, Daniel Gamino. The Appellee, Oklahoma Department of Corrections (hereinafter “DOC”), appears by and through counsel, Michele Minietta. Also present for Appellee was Table Representative, Jerry Chrisman.

Appellant Newman was a permanent, classified employee of DOC, appealing an adverse disciplinary action of discharge. During the administrative hearing, the sworn testimony of witnesses was presented, along with exhibits. Joint Exhibits 1 through 14 and 16 through 22 were offered jointly and were admitted. Accordingly, the exhibits presented and admitted are made a part of the record herein.

After careful consideration of the record, including all relevant evidence, testimony, and exhibits, the undersigned Administrative Law Judge issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Background of Case

Newman has been employed by DOC at the Mack Alford Correctional Center (hereinafter “MACC”) since March, 2011 as an Alcohol and Substance Abuse Counselor III. MACC consists of one facility with the minimum security offenders housed “outside” the barbed wire fencing and the medium security offenders housed in a separate, more secure area. Since

hiring, Newman performed the job of CATCH (Changing Attitudes to Change Habits) Coordinator for the minimum security population. The parties stipulated that the Merit Protection Commission (hereinafter "MPC") has jurisdiction of this matter, that Newman was a permanent, classified employee of DOC, that Newman timely filed her appeal and that Newman was discharged effective October 21, 2013.

In the summer of 2013, DOC considered expanding the CATCH program to include offenders in the medium security section of MACC. Newman repeatedly expressed her displeasure with the program expansion and stated that she would not work in the medium security facility. The expansion was ultimately approved and was set to begin in October. As a result of Newman's stated objection to the expansion, the MACC Warden issued a letter to Newman, clearly stating what would be expected of her in her role as the Alcohol and Drug Counselor (Joint Exhibit 2). On August 28, 2013, Newman responded to that letter of expectation (Joint Exhibit 3). In her response, Newman outlined her duties and her performance, which also detailed a number of criticisms, including a lack of support for the program, difficulty getting proper equipment, increasing work load and failure to provide increases in the pay level. Newman concluded the letter that she felt her safety was at risk and that she intended to keep her promise to her family that she would not work with medium security offenders. She stated that she would assist with the development of the program documents, but would not provide direct treatment services to the medium yard. DOC attempted to alleviate Newman's concerns. Newman's office was to remain on the minimum side, and the sessions that she would be required to attend were scheduled in the Central Control office, at the front of the medium security area. Orientation for the CATCH program was scheduled for October 8 and Newman was advised that she was expected to attend and conduct the orientation, which she refused (Joint Exhibit 6).

On October 8, 2014, after Newman failed to appear for the orientation as directed, DOC provided her with notice of the proposed disciplinary action of termination (Joint Exhibit 1). The notice alleged that Newman's conduct constituted misconduct and insubordination for failure to devote full time, attention and effort to her duties, failure to follow the lawful orders or directives of supervisors or managers, and wilful failure to carry out her assigned duties. A pre-termination hearing was held and by a letter dated October 21, 2013, DOC provided Newman with written notice of termination (Joint Exhibit 19). Newman generally denied all allegations of misconduct

and alleged that DOC was expecting her to work outside of her classification. She timely appealed the disciplinary action to this tribunal.

ISSUES

1. Did DOC have just cause to impose discipline in this matter?
2. If so, was the discipline so imposed just and appropriate under the circumstances?

The Testimony

The testimony of five (5) witnesses was given in this administrative hearing, with each witness sworn and offered under oath.

Christy Warren is employed at DOC as Program Director, coordinating and overseeing the state-wide substance abuse programs in all DOC facilities. Warren discussed the CATCH program at MACC and testified that the site Program Director was responsible for the day-to-day activity. She stated that initially, the CATCH program at MACC consisted of 36 offenders and was much smaller than most of the other programs. This same program was expanded to ultimately include an additional 36 offenders. There were no other changes proposed to the program. Warren stated that during the planning process, Newman repeatedly refused to work with the medium security offenders. As a result, modifications and accommodations were made to alleviate Newman's concerns, including the location of services. During a meeting to finalize the program, view the area and meet the contract providers, Newman was openly critical of the expansion and tried to "shoot the program down". Warren admits that Newman had good performance as the CATCH Coordinator up to that point. After Newman's termination, the position was reviewed and a decision was made to upgrade the qualifications and classification in order to expand the pool of potential applicants. Warren admitted that the rating assessment for the MACC CATCH program improved under Newman's supervision. She also stated that Newman had requested the position be upgraded so that she would make more money and that the Warden promised to look into it. Nothing was done because of Newman's continued refusal to act as CATCH Coordinator for the expanded program. Warren testified that when the program was expanded, Newman's duties and responsibilities never changed, however the

number of offenders doubled. Newman's office, where she spent the majority of her time, remained in the minimum security area.

Melissa Foster is the Case Manager Supervisor at MACC and oversees the paperwork for all offender programs, including the CATCH Program. She testified that Newman was a very good employee. She stated that in July, 2013, they learned of the possibility of the expansion of the CATCH program at MACC. She said that Newman was very concerned about the extra work and was particularly upset about working on the medium security side of the facility. In August, they learned that it was "a done deal" and Newman threatened to quit. She advised her to calm down and was hesitant because she didn't want to lose Newman. Foster admitted that she and Newman were very unprofessional in the meetings to discuss the expansion and that the Warden was justified in being very stern with them in order to get their attention. Foster said that the CATCH Program was a very positive program for the facility and she came around to embrace the expansion, even though she was sorry to lose Newman as a result. Foster stated that the CATCH Program standards required Newman to conduct the orientation because it required the Coordinator to express the goals and expectations of the program and to be available to monitor the progress and answer questions. She stated that even though they worked out that the orientation could be held in the Control Room, Newman still refused, stating that she wouldn't set foot on the medium security yard. Newman offered to conduct the meeting via computer camera, however that did not constitute "direct contact" with offenders as required by the program. Foster stated that the Control Room, although medium security, was a very secure environment and was very safe. Despite this, she stated that Newman refused verbally, followed by written refusal (Joint Exhibit 6). She also admitted that she provided a letter of recommendation for Newman (Joint Exhibit 16).

Tommy Sharp is the Deputy Warden at MACC. He testified that MACC in October, 2013, MACC had a population of 805 but that 120 offenders have been recently added, increasing the current offender population to 935. This increase in the population resulted in more work for all of the employees, with no corresponding pay increase due to the increased workload. Sharp stated that it is just part of the job. He stated that everyone is affected when programs are expanded or the population increases and that is just the nature of corrections. He testified that there are two areas of the facility and the minimum security area is just outside of the fencing and the medium security area is inside the double fence line. He stated that there is

more control in medium security and more frequent checks. He stated that there are no locks on cells in minimum security and no fencing. Sharp stated that there is a point system to determine the security level of an offender, which includes the type of crime, prior record and good behavior while incarcerated. Sharp testified that he didn't believe there was any difference in "safety" between the medium and minimum security levels. He stated that the majority of assaults or trouble with offenders occurs in the residential area and very few occur in other locations of the facility. He stated that the CATCH Program is not located in the residential area of either level so "safety" would be the same for both areas. Sharp stated that he was Newman's second line supervisor. He described both Newman and Foster as being very disgruntled during the August 14 meeting to discuss the program expansion. Later, he stated that Foster told him that she was very concerned that Newman would not conduct the orientation as directed. Sharp then gave Newman a written directive to conduct the orientation herself (Joint Exhibit 6) and that he made the incident report when Newman failed to appear as directed on October 8 (Joint Exhibit 5). Sharp denied that there was any greater risk associated with working in the medium security area. He discussed the Serious Incident Reports for MACC (Joint Exhibit 20) and admitted that of the 16 incidents, 3 were on the minimum security side and 13 were on the medium security side, but noted that many of them were in or near the residential units. Sharp testified that the job family descriptor for Alcohol and Drug Counselor makes no reference to the security level and the position applies to all facilities and/or security levels.

Jerry Chrisman is the Warden at MACC. He has been employed at DOC for 25 years and has worked at almost all of the DOC facilities around the state. Chrisman emphasized that human behavior is very hard to predict and the level of security assigned to an offender is not always an indicator to the level of violence he or she is capable of. He stated that the CATCH Program helps improve offenders and assist in preparing them for outside life and that he welcomed the expansion of the CATCH Program. He testified that the first real meeting on the expansion was August 14. At that meeting, Foster and Newman were very rude, negative and confrontational. He stated that he was very embarrassed by their behavior and he was very stern with them in order to get their attention and to change their attitudes. He said that Newman asked him about upgrading her position to a level IV and he said he would look into it as the program expanded. He said after Newman was terminated, they had a unique opportunity to upgrade the position to Psychologist Clinician II, which required a master's degree. This

upgrade allowed a broader use of the position. He denied that Newman was ever required to work outside of her classification. He stated that he gave Newman every chance to perform her assigned duties without consequence and that he took disciplinary action only after she actually refused to show up for orientation. He testified that Newman stated her only basis for refusing to comply with the directive was that she had made a promise to her son and that she had to keep that promise. Chrisman stated that MACC is the whole facility and any person hired at MACC may have to work either or both minimum and medium security. No positions are designated only minimum security. He stated that everyone loses by Newman's termination, but he had no other choice. There was no lesser form of discipline that would be appropriate given Newman's blatant, absolute refusal to perform her job. Chrisman stated that it was "offensive" to the rest of the great staff at MACC that Newman thought she was "too good" to work with the medium security offenders. He stated that the offenders view the various programs as "benefits" and there are almost never any problems involved. Chrisman stated that a single incident can sometimes elevate the level of discipline necessary. He stated that he intended to upgrade Newman's position once the program was expanded, but her refusal to perform her duties kept him from taking any such action. He stated the new job classification was broader and additional duties were added.

Tammy Newman (now Henry) was hired as a DOC employee in March, 2011. She had previously worked at MACC as a contact provider. She stated that all of the work she performed had been on the minimum security side of the facility. She stated that she went to the medium security side occasionally for meetings or training. She stated that, in her mind, she had issues concerning her personal safety. She also stated that her son had serious concerns when she went to work at MACC and he made her promise to only work on the minimum security side. She said he had lost his father and grandparents and this was a big issue for him. She stated that she was very upset that the expansion of the Program was done without any discussion with her or her supervisor. Despite her concerns, she prepared all of the orientation packets, the screening forms and curriculum for the program expansion. Newman stated that she made it clear at each step that she would not be at the orientation in the medium security area. Newman admitted that she would not perform those duties in the medium security CATCH Program even if they had promoted her or increased her pay.

DISCUSSION

DOC policy OP-110215 defines insubordination as “any failure to carry out the lawful orders or directives of supervisors/managers, or any conduct towards a supervisor/manager which disregards or is disrespectful of the authority or office of the supervisor/manager” (cited in Joint Exhibit 1). It is essentially undisputed that Newman received a directive from her supervisors to conduct an orientation for the CATCH Program for the medium security offenders on October 8, 2013. It is also undisputed that Newman refused to provide any direct services in connection with the CATCH Program expansion. DOC argues that Newman’s duties were not impermissible expanded, that she was performing the exact same duties, only that the number and location of offenders changed slightly. The evidence supports these arguments. Newman failed to point to any specific language or evidence that supports her arguments that the directive required her to perform duties outside of her job classification. Newman also disregards the statutory provision that states that the state agency has the absolute right to designate the place where its employees shall perform their duties.

The goal of progressive discipline is to redirect classified employees toward improved performance and conduct. The evidence supports that Newman refused to comply with the directive and nothing was going to change her position. The undersigned has considered all of the facts and circumstances of this case and the testimony of the witnesses. DOC has met its burden that a violation of policy has occurred. The nature of the misconduct demonstrates that application of progressive discipline would not have been effective. Given the totality of the circumstances, no other lesser form of discipline appropriate.

CONCLUSIONS OF LAW

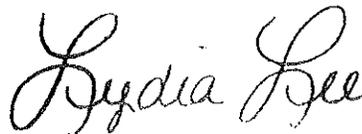
1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause and the filing of the Petition for Appeal was timely.
2. Any finding of fact which is properly a conclusion of law is so incorporated herein as a conclusion of law.

3. Title 74 O.S. §840-6.5 and OAC 455:10-9-2 states that the Appellee DOC has the burden of proof in an adverse action and must prove by a preponderance of the evidence that just cause exists for the adverse action and that the discipline imposed is just.
4. OAC 455:10-11-14 indicates that termination may be imposed for misconduct and/or insubordination.
5. The preponderance of the evidence shows that Newman's conduct in refusing to perform her assigned duties meets the DOC definition of insubordination contained in OP-110215.
6. Appellee DOC has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Newman for her insubordination and her appeal on that ground is denied.
7. The evidence demonstrates that the assigned duties of acting as the CATCH Coordinator for the medium security offenders were within the classification for Drug and Alcohol Counselor III.
8. 74 O.S. §840-4.19 provides that a state agency shall have sole and final authority to designate the place or places where its employees shall perform their duties.
9. Appellee DOC has met its burden to prove, by a preponderance of the evidence, that the discipline of termination was just and appropriate under the circumstances and consistent with progressive discipline, as no other method of discipline would have been effective given the nature of the misconduct.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant Tammy Newman, MPC 14-107 be DENIED.

This Order entered this 16th day of June, 2014.



Lydia Lee
Administrative Law Judge