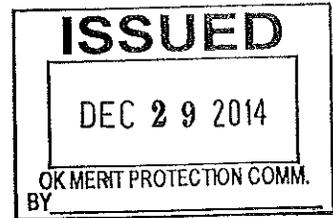


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

CARLA HUMPHRIES,)
Appellant,)
)
v.)
)
OKLAHOMA DEPARTMENT OF)
VETERANS AFFAIRS,)
Appellee.)
)

Case No. MPC 14-148



FINAL ORDER

This matter comes on for hearing on September 22 and October 21, 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, Carla Humphries, (hereinafter “Humphries”), appears personally and through counsel, Daniel Gamino. The Appellee, Oklahoma Department of Veterans Affairs (hereinafter “ODVA”), appears by and through counsel, Kara Smith. Also present for Appellee was Table Representative, Susan McClure.

Appellant Humphries was a permanent, classified employee of ODVA, appealing an adverse disciplinary action of discharge. During the administrative hearing, the sworn testimony of witnesses was presented, along with exhibits. Appellee ODVA offered its Exhibits 1 through 10 and Exhibit 14 which were admitted with no objection. Appellant Humphries offered her Exhibits 6, 9 and 13 which were admitted with no objection. Appellant Humphries also offered her Exhibit 10, which was admitted over Appellee’s objection of relevancy. Accordingly, the exhibits presented and admitted are made a part of the record herein. Following the evidentiary hearings, the parties were given additional time to present written summations. Due to a death in the family of the undersigned Administrative Law Judge, the issuance of this Final Order was delayed.

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

FINDINGS OF FACT

Background of Case

Humphries had been employed as an LPN by ODVA at the Oklahoma Veterans Center in Clinton, OK (hereinafter "Center") since November, 2005. The parties stipulated that the Merit Protection Commission (hereinafter "MPC") has jurisdiction of this matter, that Humphries was a permanent, classified employee of ODVA, that Humphries timely filed her appeal and that she was discharged effective January 2, 2014.

On December 3, 2013, Humphries was confronted about removing certain daily reports and medication sheets from the Center. Humphries admitted to removing some of the reports for her own use. Certain reports were retrieved from her vehicle trunk and/or from her bag. ODVA provided Humphries with notice of the proposed disciplinary action of termination (Exhibit 1). The notice alleged that Humphries's conduct constituted misconduct and a violation of HIPAA and ODVA SOP 1300. A pre-termination hearing was held on December 23, 2013 and by letter dated January 2, 2014, ODVA provided Humphries with written notice of discharge (Exhibit 2). Humphries timely appealed the disciplinary action to this tribunal. Humphries claims that there was no violation of policy or regulation and her use of the reports was appropriate and permitted. She further claimed disparate treatment in that numerous other violations by other employees did not result in any disciplinary action.

ISSUES

1. Did ODVA 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 nine (9) witnesses was given in this administrative hearing, with each witness sworn and offered under oath.

Carla Humphries provided testimony first. She testified that she was terminated on January 2, 2014 and has not worked since. She stated that she had worked at the Center as an LPN for approximately 8 years. She testified that she received training on HIPAA and the medical confidentiality requirements in school as well as receiving training several times on the

issue from ODVA. She acknowledged her signature on the Confidentiality form (Exhibit 7) and on the form for receipt of the various policies for ODVA (Exhibit 8). Humphries discussed the various daily reports and medication administration reports and stated that they may contain personal health information on the Center residents, including blood pressure, blood sugar finger stick information and medications. She said that when asked about the report sheets, she admitted taking them and immediately returned them. She was then questioned about a certain locker at the Center. She stated that the lock belonged to a former employee, who gave the key to Humphries but that it was not her locker and she never used it because maintaining locked lockers was not allowed.

Humphries stated that she occasionally copied the reports in order to review them or to assist her in finishing the charting. She stated that she had been taught to keep the records to refer to if there was a need to use them at a later date and that they were always for the patients care, not for her personal use. She also discussed that she kept one medication error report with the patients name redacted to remind her of the error and not to repeat it (Appellant's Exhibit 6). Humphries stated that she kept the reports to better herself which demonstrated her dedication to the care of her patients. She testified that she never showed these reports to anyone and never discussed them. As such, she states that she never violated the policy. Humphries testified that both HIPAA and SOP 1300 allows the use of these records for the treatment of the residents. She said that she takes her responsibilities very seriously as evidenced by a letter of commendation she received (Appellant's Exhibit 9). Humphries also discussed her PMPs and the fact that most were meets standards (Appellant's Exhibit 13) and that she received good comments. She testified that she was never given her final PMP nor was it discussed with her (Exhibit 10).

Humphries discussed the events of Dec. 3, 2013. She said she was called to Deidre Chambers' office and was asked about the daily report sheets. She admitted that she sometimes took them but was not allowed to explain. She stated that she was misunderstood. She said that Ms. Chambers' account of the meeting was inaccurate (Exhibit 3) as she never admitted to taking the MARs home. She also stated that she was clear that she never disclosed the information or discussed it with anyone. Humphries testified that occasionally it is impossible to complete all of the charts at the end of the shift due to work load, patient emergencies or computer glitches and there is no place at the Center to keep these reports without them being shredded or

destroyed. She stated that the staff does not have a secure area, secure lockers or any other space to maintain these types of records. She stated that the employees are not allowed overtime so she would retain the records in order to complete them at the next shift. She said one record was in her vehicle and the rest were in her bag in the Center. She said that the nurse who trained her specifically told her to do this, as she also kept the reports. She said that each time she attempted to explain and correct the allegations, she was ignored. Humphries was adamant that the records were never disclosed, released or discussed with anyone outside the Center.

Deidre Chambers is employed at ODVA as Director of Nursing at the Center. She was an LPN and became an RN in 1989. She discussed the requirements of HIPAA and said the records were confidential and used only on a "need to know" basis. She stated that Humphries was terminated for violating HIPAA and SOP 1300 and that employees "just know" that the records are not to be taken from the Center because it could result in improper disclosure. Chambers stated that she sent a report to the Board of Nursing but that she received no response and assumed that no professional discipline occurred. Chambers stated that there was no ambiguity and that there was no reason for the records to be taken home. She stated that no one else to her knowledge ever took these records home. She stated that there is a formal Quality Assessment and Improvement Committee and it is a formal process.

Chambers admitted that there was no evidence of disclosure of confidential information and that the only evidence of removal was Humphries admission. She acknowledged that there were occurrences of the computers being down, passwords refused or patient crisis at the end of shifts which could result in an employee being unable to chart properly at the end of shift. She stated that it was a hard and fast rule that the records were not to be carried out the building, even if it was not stated that way in the written policy. Chambers stated that she wasn't aware of where the documents were, but that Humphries brought them to her and they were placed in an open, unsecured "shred box". She stated that she took them from the box and attached them to her report (Exhibit 3). Chambers discussed various e-mails that were sent by her and others at the Center which contained personal health information about residents. These messages include information about confidentiality violations, but to her knowledge no discipline was undertaken involving any of those issues (Appellant's Exhibit 10). She said that the identity of the violators was unknown but acknowledged that full investigations were not conducted. Although Chambers alleged that Humphries' actions constituted a serious violation of HIPAA, she

admitted that she did not report this potential breach to any of the residents, did not report it to the Secretary of Health and Human Services and failed to include them in a log of breaches, all as required by HIPAA. Chambers also identified an advertisement for a private auto dealership that was published using photographs of residents. She stated that she was not aware if residents gave written permission for use of the photos, but the Administrator approved the ad.

Bill Abney, Jr. testified that he represented Humphries at the pretermination hearing. He said that while he was at the Center for that hearing, he walked through the hallways and observed medication reports in open, unsecured areas and he could easily see the confidential patient information. He indicated that there was no security and did not see any nurses in the area while he was there for about five minutes.

Janis Caulkins is an RN and is SW Manager at the Center. She was Humphries' supervisor and provided annual training on HIPAA. She testified that Chambers told her that Humphries took records from the Center and was asked to look in a locker at the Center. She stated that Humphries went to look in her car and later returned with a total of six sheets of resident reports. Caulkins stated that it was "common knowledge" that records were not to be taken from the Center. She stated that employees could keep these reports in the med room if needed for charting at a later time. She also stated that she was not aware of anyone else ever taking records out of the Center or she would have reported them. She testified that Exhibit 3 was prepared by Chambers and that she signed it to "acknowledge accuracy". On cross examination, she admitted that SOP 1300 doesn't specifically prohibit taking records outside of the building and that there is no specific secure area in the med room to keep records or reports. Caulkins also admitted that she completed Humphries' last PMP after she left and that she never discussed it with Humphries although she certified that she had discussed it with her. She stated that she was not aware that Humphries had been terminated at the time she completed the PMP, although she included on the form that Humphries was not eligible for re-hire. It must be noted that Caulkins' testimony was extremely contradictory.

Candie Nightingale is an ODVA RN Supervisor at the Center. She stated that she received training on HIPAA and SOP 1300 annually. She testified that she was present in Chambers' office on Dec. 3 when Humphries was asked about removing records. She stated that Humphries admitted taking the reports home but she did not recall her admission regarding the medication reports. Nightingale stated that there was no secure place in the med room to keep

records and that there is a file cabinet but it is not secure. She stated that there was no evidence of any improper disclosure of confidential information, except that she thought just removing the records from the building was disclosure in her opinion.

Katherine Kreizenbeck is the Administrator for the Center. She stated that she had been with ODVA for 29 years and had been the Administrator for 11 years. She stated that it was reported to her that Humphries had taken records out of the building and that she thought that in itself was a HIPAA violation. She stated that due to two unrelated prior disciplinary actions, termination in this case was proper progressive discipline. She stated that the pretermination hearing did nothing to change her opinion. She said that HIPAA violations include failure to properly maintain records as well as improper disclosure. Kreizenbeck admitted there is no evidence in this case of “improper disclosure” of protected medical information. She also stated that SOP 1300 does not specifically prohibit removing records from the Center. She also admitted that the incidents set out in the emails regarding improper use of patient information did not result in any disciplinary action to any employee to her knowledge. Kreizenbeck testified that Double K auto dealership is her husband’s business and that she provided resident photographs for his use and was not aware if permissions were obtained. She did not view this use as a violation of confidentiality, even though it identified the residents by name. She also admitted that the responsibility for reporting HIPAA violations lies with her, but that she did not report the breach to any residents, to the Secretary of Health and Human Services nor did she maintain a breach log, all as required by HIPAA regulations. She testified that she was not aware of those requirements.

Regina Stinson King worked as an RN at the Center for 17 years and retired in 2013. She served the last two years as Assistant Director of Nursing. King testified that it is often very busy at the end of shift and it was a common practice for nursing staff to keep the report sheets to finish the data entry at a later time. She stated that LPNs have no safe place in the Center to keep these sheets. She said that she never considered it to be a HIPAA violation to remove the reports from the Center. She also admitted that the medication reports contained confidential patient information and they were often left out on the medicine carts for anyone to access. She testified that these records went missing at least two different times, with no discipline imposed. King testified that she believed that Humphries had been “targeted” and cited her previous disciplinary actions while others with similar misconduct went unpunished. She said this disparate situation

at the Center was the reason she took early retirement. She testified that there was often little investigation of incidents, that decisions were unsupported by the facts and that the rules and policies were not equally applied. King believed Humphries was very reliable, was a good nurse and was good with the patients. She stated that it was common practice to take the reports home and complete the data entry at a later time. She said Humphries was always truthful with her.

Charlotte Garrison is a Nurse Manager at the Center. She is an RN and has worked there for 5 years. She testified that the daily report sheets are used to record various information and to provide necessary information to the next shift. She testified that there is no secure place to keep these records in the Center. She said that nurses use these sheets to put information into the computers and there is often not sufficient time at the end of shift to complete this. She said that overtime is not allowed. She agreed that nurses often keep these records to chart later and she assumed that nurses take these sheets with them and bring them back later to complete the records. She stated that it was only recently, since this hearing, that the Director of Nursing sent an email saying that this practice was no longer permitted (Exhibit 14). Garrison testified that she was not aware of any other employee that had been disciplined, much less discharged, for HIPAA violations. She stated that discipline at the Center is very inconsistent and that some employees get away with anything. She stated that Humphries was a very professional nurse, was good with the patients and was very honest and hardworking. She stated that in the past, taking these reports out of the building was not considered a violation of policy.

ODVA called a rebuttal witness, Melanie Taylor. Appellant objected, stating that there was no surprise necessitating this witness' testimony. She was permitted to testify. Taylor is an Assistant Director of Nursing at the Center. She testified that SOP 1300 specifically states that the reports should not be taken from the building and that employees are trained on this. On cross examination, she admitted that the policy did not specifically contain this prohibition but she was never aware of anyone taking these reports home. She also admitted that she was off on maternity leave during the relevant time of this matter although she signed as the reviewer of Humphries final PMP.

DISCUSSION

The parties stipulated to the imposition of two instances of prior discipline for Humphries. In April, 2011, Humphries received a Letter of Reprimand for failure to report to work as scheduled and for abuse of leave policy. In July, 2011, Humphries received a Suspension Without Pay for inappropriate behavior and attitude with residents and co-workers. Even with these two disciplinary actions in 2011, Humphries received a “Meets Standards” on her PMP for that period, indicating that the prior discipline had the desired result of improving her performance and/or conduct.

Almost two years later, this incident occurred. Many of the facts in this case are not disputed or were admitted by the various witnesses. It is undisputed that Humphries admitted that she made copies of certain report sheets and occasionally removed those documents from the Center, that those report sheets contained personal health information for residents of the Center and that on December 3, 2013, Humphries had six reports in her vehicle and/or in her bag and she provided those reports to the Director of Nursing upon request. Consistently, Humphries stated that the reports were used only for her use in providing care for the residents. ODVA apparently does not contest this assertion but takes the position that the very act of taking the records out of the Center constitutes a breach of confidentiality under HIPAA and a violation of SOP 1300. This interpretation cannot be found within either HIPAA or SOP 1300. Rather, ODVA argues that it is “common knowledge” and Humphries “should have known” not to take these reports from the building. The Director of Nursing testified that it was a “hard and fast rule” that records could not be taken from the building but admitted that the policy did not actually state that. ODVA stated that its employees received annual training on confidentiality but did not produce a single document to support its interpretation or its prohibition on taking reports from the building. In fact, ODVA communicated “do not make copies for your records or leave the building with any of this information” only after the first day of hearing in this matter. This email from Deidre Chambers, the Director of Nursing, was sent on September 24, 2014 (Exhibit 14).

Humphries testified that she retained the reports to assist in completing the computer records at her next shift. Almost every witness acknowledged that the end of shift was often chaotic and there wasn’t always sufficient opportunity to chart all of the information. Several

witnesses testified that there was no secure place in the Center to keep those records, without risk that they would be lost or destroyed. Three witnesses testified that it was common practice to keep the reports until the next shift. The single Medication Error Report that Humphries had in her possession had been redacted to remove the personal health information identifiers (Appellant's Exhibit 6) and she testified that she retained it to remind her of the seriousness of medication errors. ODVA offered no evidence to dispute this.

The Notice of Proposed Action (Exhibit 1) and the Notice of Discharge (Exhibit 2) contain almost identical allegations – that it was a violation of HIPAA and ODVA Policy to take these records from the building. There are no allegations and there was no evidence that confidentiality was ever breached by disclosure of protected health information. It is the position of the ODVA that the action of removing the reports from the building were violations of HIPAA and Policy, however, they offer no authority in support of this proposition except that it is “just known”, was “common knowledge” or was a “hard and fast” rule. If Humphries' actions were, in fact, a violation of HIPAA and SOP 1300, then ODVA should have treated this as a breach of confidentiality and taken the appropriate steps. In fact, both the Director of Nursing and the Center's Administrator admitted that ODVA took no action to document or report the alleged “breaches” of confidentiality to the residents or to the Secretary of Health and Human Services as required by the HIPAA regulations.

ODVA argues that Humphries “should have known” not to take documents from the building and that she “could have requested a secure place” within the Center if it was necessary to keep these records for her use. However, Humphries, King and Garrison all testified that it was common practice to take the records for charting at a later time because there was no secure place at the Center to keep them.

While ODVA is right to be concerned about any potential breach of confidentiality, this case should not have resulted in the discharge of a good employee. This could have been an educational opportunity and could have resulted in an improvement and clarification of the process. It was not used in that manner. Rather, ODVA found that Humphries was in violation of HIPAA regulations and ODVA SOP 1300 “which states that all employee and resident personal and medical records will be maintained in a confidential manner” (Exhibit 2). While keeping personal health information in a personal vehicle is not the best practice, it appears that it occurred because the employer had no secure area within the Center. Furthermore, there is no

evidence in this case that any personal information was disclosed or that confidentiality was actually breached. Compare this to the numerous other instances of possible disclosure in the Center, and it does appear that Humphries was singled out for disparate treatment.

Finally, a discussion of the use of progressive discipline is necessary. The goal of progressive discipline is to redirect classified employees toward improved performance and conduct. OAC 455:10-11-4 provides that progressive discipline is designed to ensure not only the consistency, impartiality and predictability of discipline, but also the flexibility to vary penalties if justified by aggravating or mitigating conditions. It also provides that *repetition of an offense* is accompanied by a generally automatic progression to the next higher level of discipline *absent mitigating circumstances* (emphasis added). Even the Notice of Discharge discusses “escalating forms of discipline when incidents of policy or rule violations *continue*”. This was not a continuing series of misconduct. ODVA does not urge that this one incident of misconduct is so serious that it warrants the discipline of termination alone. ODVA argues that the two instances of prior discipline for entirely unrelated reasons justify the progression of discipline to discharge. It is clear that the Merit Rules grant an employer the flexibility to vary penalties if justified by aggravating or mitigating conditions, however, ODVA provided testimony that aggravating or mitigating factors was never considered. The testimony from the Administrator was that she never considered mitigating circumstances because progressive discipline required her to move to the next step of discharge. Further, there was evidence that other incidents which involved allegations of breach of confidentiality were never fully investigated and no discipline was given, giving rise to Humphries claims of disparate treatment. As a result, ODVA’s application of progressive discipline is flawed.

CONCLUSIONS OF LAW

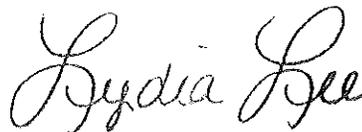
1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause and the filing of the Petition for Appeal was timely.
2. Any finding of fact which is properly a conclusion of law is so incorporated herein as a conclusion of law.

3. Title 74 O.S. §840-6.5 and OAC 455:10-9-2 states that the Appellee ODVA 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. The preponderance of the evidence fails to show that the cited policy and regulations prohibit the conduct of Appellant Humphries in removing certain records from the Center for use in charting at a later time. The preponderance of the evidence fails to show that Appellant Humphries engaged in misconduct necessitating disciplinary action.
5. Appellee ODVA has failed to meet its burden to prove, by a preponderance of the evidence that just cause exists to discipline Humphries.
6. In accordance with OAC 455:10-9-2 (f) (1) (B), upon a finding that just cause did not exist for the adverse action, a presiding official may order the reinstatement of the employee, with or without back pay and other benefits. A presiding official may also order that documentation of the adverse action be expunged from any and all of the employee's personnel records.
- 7.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant Carla Humphries, MPC 14-148 be SUSTAINED. The discipline imposed upon Appellant is rescinded consistent with this Order. Appellant is to be reinstated to her previous position and receive all back pay and benefits to which she is entitled. Further, Appellant's personnel records are to be expunged consistent with this Order.

This Order entered this 26th day of December, 2014.



Lydia Lee, OBA #10374
Administrative Law Judge