

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF VETERANS AFFAIRS,)
)
Petitioner,)
)
vs.) Case No. 01-1546
)
HENRY BISHOP,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held on June 26, 2001, in Lake City, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: James Sloan, General Counsel
Department of Veterans Affairs
Koger Center, Douglas Building, Suite 100
2540 Executive Center Circle, West
Tallahassee, Florida 32301-4746

For Respondent: Weyman T. Johnson,
Qualified Representative
Suite 2400
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Atlanta, Georgia 30308-2222

STATEMENT OF THE ISSUE

May Respondent be discharged from the Robert H. Jenkins Veterans' Domiciliary Home of Florida for four violations of

Rule 55-11.009(1), Florida Administrative Code, as more fully set out in the February 16, 2001, letter of dismissal.

PRELIMINARY STATEMENT

This case was referred to the Division of Administrative Hearings on or about April 25, 2001.

At the commencement of the disputed-fact hearing on June 26, 2001, Weyman T. Johnson was examined and accepted as Respondent's qualified representative for purposes of this cause.

Petitioner presented the oral testimony of Tom Leahy, Craig Bracht, Marjorie Rigdon, and Paulette Tyler. Petitioner had five exhibits admitted in evidence.

Respondent presented the oral testimony of Ted Cook and Jerry Orwell and testified on his own behalf.

A Transcript was filed on July 31, 2001. The parties stipulated to filing their proposals within 21 days of the filing of the Transcript, or August 21, 2001. Petitioner filed a Proposed Recommended Order on August 3, 2001. Respondent filed his Proposed Recommended Order on August 21, 2001. Petitioner's Amended Proposed Recommended Order apparently only adds numbers to the paragraphs of the Petitioner's original proposal and was not objected-to by Respondent. Therefore, although late-filed, Petitioner's "corrected" Proposed Recommended Order has been considered.

FINDINGS OF FACT

1. The Robert H. Jenkins Veterans' Domiciliary Home of Florida (hereafter, "The Veterans' Home"), is licensed by the Florida Agency for Health Care Administration as an extended congregate care facility and is also licensed to provide limited nursing services and limited mental health services. It is commonly known as an "ALF," or "assisted living facility."

2. The Department of Veterans' Affairs has oversight of The Veterans' Home. All of its residents are military veterans. Some have significant physical limitations, such as missing limbs and blindness. Approximately thirty of its 130 residents suffer one or more forms of psychiatric disturbance, including, but not limited to, geriatric conditions.

3. Respondent served with distinction in the United States Navy during World War II. Thereafter, he graduated from college and pursued a teaching career at P. B. Young Laboratory School. He is now retired. He has been a continuous resident of The Veterans' Home since approximately January 2000.

4. On February 16, 2001, Respondent was issued a letter of discharge based on the following alleged incidents:

a. FAC 55-11.009(1)(b)3: Members shall maintain a courteous relationship toward other members and members of the staff. A Behavior Management Report (January 12, 2001), reflects that you verbally responded inappropriately to another member.

b. FAC 55-11.009(1)(b): Members shall conduct themselves in a way that does not endanger the safety or security of other members of the home. A Behavior Management Report (February 2, 2001) reflects that you hit another member in the stomach.

c. FAC 55-11.009(1)(b): Members shall conduct themselves in a way that does not endanger the safety or security of other members of the home. A Behavior Management Report (February 5, 2001) reflects that you pushed another member.

d. FAC 55-11.009(1): Members of the home shall cooperate fully in the preservation of order and discipline in the Home. Behavior Management Reports (February 13, 2001 and February 15, 2001) reflect that you attempted to interfere with nursing services to another member. (Emphasis supplied).

5. The Veterans Home administrator testified that no single incident was cause to dismiss Respondent, but that the cumulative nature of the incidents was behind her decision.

6. No evidence related to the dates of February 2, 13, or 15, 2001, was offered.

7. Mr. Cook is a wheelchair-bound amputee, whom Respondent regularly assists with daily living. On January 1, 2001, Mr. Cook was unable to feed himself, and Respondent had, according to their custom, prearranged a tray and two chairs in the lunchroom so he could feed Mr. Cook. However, there were no assigned chairs in the lunchroom, and another male resident, Mr. Gordon Flash, took the seat in the lunchroom customarily

taken by Respondent. Respondent retaliated by pushing over the chair in which Mr. Flash was seated.

8. Nurse Leahy observed a fresh cut on Mr. Flash's face as a result of the January 1, 2001, altercation. No one observed Respondent kick Mr. Flash. Mr. Flash was sent to a hospital where he was diagnosed with one or two broken ribs. However, no nexus by medically competent testimony tied Mr. Flash's broken ribs to his January 1, 2001, altercation with Respondent.

9. The Home's administrator had previously observed Mr. Flash taking the lunchroom chair in which Mr. Cook customarily sat and concluded that Mr. Flash was the instigator and Respondent was the reactor in the January 1, 2001, incident. Nonetheless, she issued a written warning to both Mr. Flash and Respondent. Respondent's warning charged him with violating Rule 55-11.009(1), Florida Administrative Code, not cooperating fully in the preservation of order and discipline in The Home and subsection (8), not maintaining a courteous relationship towards other residents and members of staff. Respondent acknowledged receipt of this warning and knew that future similar offenses could result in his dismissal from The Veterans' Home.

10. Nurse Leahy, who reported the January 1, 2001, incident, recommended that Mr. Flash and Respondent be kept separated. After the January 1, 2001, incident, Respondent was

observed modifying his own behavior by moving himself and Mr. Cook to other chairs in the lunchroom.

11. On January 12, 2001, Custodial Supervisor Craig Bracht observed Respondent and another resident, Mr. Pullio, in a hallway, pulling a legally blind female resident between them in something akin to a tug-of-war. Respondent had cocked his arm back, apparently threatening to hit Mr. Pullio if he did not turn the female resident loose. Mr. Bracht asked the males to "behave" and directed the female on her way. Mr. Bracht had observed Mr. Pullio acting mildly erratic before. Mr. Pullio has psychiatric infirmities. Mr. Bracht counseled Respondent that what he was doing was not a good thing. Respondent and Mr. Pullio went on their respective ways.

12. On February 5, 2001, Marjorie Rigdon, Nursing Supervisor, witnessed Respondent pull Mr. Flash by his arm out of a medication line and push Mr. Flash so violently that Mr. Flash "staggered backwards" but "managed to catch himself before he fell." Ms. Rigdon wrote a Behavior Management Report memorializing this incident and recommending as alternative means to prevent recurrence of such incidents, that Respondent and Mr. Flash report for medication at different times or that Respondent be missed.

13. Mr. Flash had a reputation for butting ahead in the medication line. It is probable Mr. Flash broke in line out of turn on February 5, 2001.

14. Misunderstandings regarding the medication line and alleged breaking in line are frequent at The Veterans' Home. Mentally impaired patients frequently will not wait in turn. Counseling or case management concerning the problem is a frequent occurrence. There was evidence that residents who observed the February 5, 2001, incident were divided on whether Respondent was a hero for defending fair play (waiting in line) or a villain for interfering with Mr. Flash's position in line.

15. Mr. Flash voluntarily checked out of The Veterans' Home prior to the disputed-fact hearing.

16. Respondent has no known mental infirmity, but he has frequently evidenced lack of patience and demonstrated intolerance of mentally infirm residents. At the same time, he has been a valiant defender of those physically infirm patients he has been asked by the Home's staff to assist and those physically infirm patients he has appointed himself to assist. He has always responded to the administrator's requests to help other residents. Even now, the administrator would trust him to orient new residents.

17. As of the date of hearing, Respondent had resided at The Veterans' Home for 18 months and had served as elected vice-president of the Residents' Council for the last six months.

18. During the five months between the February 5, 2001, incident and the date of hearing, Respondent's behavior seems to have remediated. Instructed and cautioned by Mr. Orwell, the elected President of the Residents' Council, Respondent has modified his impatience and his aggressive behavior by writing-up reports of residents' conflicts for resolution by the Administrator or for mediation by the Residents' Council, Mr. Orwell, or himself.

19. The administrator acknowledged Respondent's recent good behavior but attributed it to the potential of the instant cause to dismiss him from The Veterans' Home.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Section 120.57(1), Florida Statutes.

21. The issue to be resolved in this proceeding concerns whether Respondent should be dismissed from the R. H. Jenkins Veterans' Domiciliary Home of Florida pursuant to the provisions of Section 296.04(5), Florida Statutes, and Rule 55-11.009(2), Florida Administrative Code.

22. The duty to go forward and burden of proof by a preponderance of the evidence is upon Petitioner.

23. Section 296.04, Florida Statutes, provides, in pertinent part,

(5)(a) The administrator shall administer and enforce all rules of the home, including rules of discipline, and may dismiss any resident of the home for any infraction of the rules, subject to the approval of the director.

24. Respondent is charged solely under Rule 55-11.009(1)(b) and (1)(b)(3), Florida Administrative Code, which provides:

55-11.009--Order and Discipline of Residents.

(1) Residents of the home shall cooperate fully in the preservation or order and discipline in the home.

(a) Residents shall observe good health habits and personal hygiene.

1. Except for any specific area designated by the Administrator for such use, the use of tobacco products inside the home is prohibited. Areas shall be designated outside the home for such use.

2. The use or possession of non-medicinal alcohol, illegal drugs or any controlled substance in the home or on the grounds of the home, is prohibited. Prescription drugs will be controlled by the home, and administered or supervised by the home staff.

3. Residents shall maintain their persons and their living areas in a clean and sanitary manner.

4. Residents shall submit to such physical or mental examinations and shall cooperate

in such health or rehabilitative programs as may be required by Health services.

(b) Residents shall conduct themselves in a way that does not endanger the safety or security of other residents of the home.

1. Residents shall not bring anything into the home or onto the grounds of the home that endangers the safety or security of other residents.

2. Residents shall not have personal items in their possession that would constitute a fire or safety hazard.

3. Residents shall maintain a courteous relationship toward other residents and members of the staff. Abusive, profane, or obscene language shall not be used.

4. Residents shall dress appropriately for the particular activity that they may be engaged in from time to time.

5. Residents shall respect the property of other residents and the facilities of the home.

6. Illegal gambling shall not be permitted at the home. (Emphasis supplied).

25. Rule 55-11.009(2), Florida Administrative Code, is in accord with Section 296.04(5)(a), Florida Statutes, and empowers The Veterans' Home administrator to discharge a resident, as follows:

(2) The Administrator, subject to the approval of the Director, is empowered by Section 296.04, Florida Statutes, to dismiss a resident of the home for any infraction of these rules.

26. Respondent asserts that under the rule of ejusdem generis, Rule 55-11.009(1)(b)3, should be interpreted in light of the specific examples of "abusive, profane, or obscene language," and that under the rule of noscitur a sociis,

Rule 55-11.009(1)(b) should be considered in light of all six examples listed therein. It is not necessary to address either of these legalistic concepts because the law is clear that Respondent may be dismissed, upon proper notice, for physical violence.

27. Physical violence by Respondent against Mr. Flash on January 1, 2001, and on February 5, 2001, and threatened physical violence by Respondent against Mr. Pullio on January 12, 2001, were proven.

28. As to the January 1, 2001, incident in which Mr. Flash's head (and possibly more) was injured by Respondent, Respondent's defense of his chair and Mr. Cook's "lunchroom territory" is not acceptable behavior regardless of how "provoking" Mr. Flash was, but this violent behavior was not charged against Respondent as grounds for the proposed agency action of dismissal from the facility, and at this late date, it cannot form grounds for the proposed agency action of dismissal.

29. Although he previously had acknowledged a warning for the January 1, 2001, chair incident, Respondent was not charged with the January 1, 2001, chair incident in the February 16, 2001, letter of dismissal, which is the proposed final agency action letter herein. Therefore, he cannot be dismissed for the January 1, 2001, chair incident, even though it was proven to have occurred.

30. Also, no evidence was adduced for the dates of February 2, 13, and 15, 2001, for which dates Respondent was charged. Consequently, he cannot be dismissed on those charges.

31. It was established that all three proven incidents (January 1, January 12, and February 5, 2001) were provoked by another resident. It was further proven that in the January 12 and February 5 incidents, the only incidents both charged against Respondent and proven against him, another resident was the aggressor and Respondent was reacting in defense of weaker, less sophisticated residents.

32. There may be standards established as to the degree of force permissible for an ALF employee to use in the defense of residents against each other, but the degree of force permissible for a citizen to use in the defense of his less capable comrades has never been spelled-out by rule. Suffice to say that "excessive force" by Respondent was not established here.

33. Even if all three proven incidents were lumped together, the undersigned is not satisfied that in light of Respondent's subsequent rehabilitation, his continued presence is detrimental to the overall functioning of The Veterans' Home in attempting to fulfill its commitments to all residents and to carry out its ultimate mission of providing for the well-being of the residents.

34. Good cause for Respondent's dismissal has not been demonstrated.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Department of Veterans Affairs enter a final order which:

Rescinds the February 16, 2001, letter of dismissal and returns Respondent to full status in the Robert H. Jenkins Veterans' Domiciliary Home.

DONE AND ENTERED this 27th day of September, 2001, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of September, 2001.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.