

**STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW**

Laurie Cooley,

Appellant,

v.

Case No. 2013-REM-10-0265

Williams County,
Hillside Country Living,

Appellee,

NUNC PRO TUNC ORDER

This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge (ALJ) in the above-captioned appeal. On April 29, 2015, the Full Board conducted an Oral Argument on this matter, where the Board more fully explored several questions with respective counsel.

We note that the Full Board has carefully and thoroughly reviewed the entirety of the record. This includes a review of the Report and Recommendation of the ALJ, along with any objections to that report and responses thereto which have been timely and properly filed, as well as the analysis presented by counsel at Oral Argument. As a result of that review, the Board hereby adopts the ALJ's findings but must modify the ALJ's recommendation and, instead, orders Appellant to be suspended for nine months; for the reasons set forth, below.

First, the record reflects that RN Amanda Seibert, Appellee's Director of Nursing (DON), believed, apparently in error, that she had *no discretion* and was required to effectively recommend or institute Appellant's removal. This was because, DON Seibert believed, Appellee's "zero tolerance policy" mandated removal for a first offense. Hillside Country Living (Hillside) receives Medicaid and/or Medicare funding. Thus, DON Siebert was apparently under the impression that applicable federal guidelines allowed nothing short of removal for an offender's first and only violation of the policy.

A careful review of the Hillside's applicable provision, however, reveals that the policy (and the commensurate federal guidelines) did provide some discretion to the appointing authority. Indeed, the record reveals that this policy would have allowed the appointing authority to effectuate an appropriate and measured response to (what was here) a conditional threat uttered in circumstances that are unlikely to be replicated in the future.

Next, the record reflects that Appellant had been a long-term employee with no discernible discipline on her record. This, of course, included a record that was devoid of any history of violence or of any propensity to threaten same.

Further, the record reflects that Appellant seemed to feel a loyalty and a strong connection to Hillside. Appellant's grandmother was a long-term resident at Hillside. Moreover, Appellant visited



the residents on her days off and would even bring her dogs for visits to offer companionship and care to the residents, especially those room-bound.

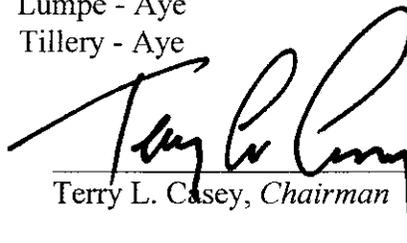
The Board does not minimize the (actual) disruptive impact that Appellant's statements appeared to have had on several Hillside staff members. Yet, the Board would be remiss if the Board did not also recognize that the statements Appellant was alleged to have made appear to have morphed over time, with the telling and re-telling of the story. Indeed, we observe that there is some not inconsiderable distance between the initial written statements offered by some of the participants when compared to the somewhat more alarming reactions and testimony offered at hearing.

Having so stated, the Board does not wish for Appellant to see her statements as anything other than highly inappropriate, intemperate, and disruptive of the workplace. As such, Appellant should be on notice that any similar such disruptive behavior may rightly call for harsh discipline. Moreover, an appointing authority who perceives that an employee is unable to perform his or her essential duties or perceives that the employee is otherwise principally unfit for duty may instruct the employee to attend an independent examination performed by the requisite credentialed practitioner.

Yet, when taking into consideration all the facts and circumstances of this situation, the Board finds that removal is too severe a punishment and, instead, modifies Appellant's instant discipline to a nine month suspension.

Wherefore, it is hereby **ORDERED** that Appellant's **REMOVAL** for her position at Williams County, Hillside Country Living be **MODIFIED** to a **NINE MONTH SUSPENSION**, pursuant to R.C. 124.03 and R.C. 124.34.

Casey - Aye
Lumpe - Aye
Tillery - Aye



Terry L. Casey, *Chairman*

CERTIFICATION

The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitutes ~~(the original)~~ a true copy of the original) order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, June 01, 2015.



Clerk

NOTE: Please see the reverse side of this Order or the attachment to this Order for information regarding your appeal rights.

**STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW**

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Appellant,

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ORDER

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We note that the Full Board has carefully and thoroughly reviewed the entirety of the record. This includes a review of the Report and Recommendation of the ALJ, along with any objections to that report and responses thereto which have been timely and properly filed, as well as the analysis presented by counsel at Oral Argument. As a result of that review, the Board hereby adopts the ALJ's findings but must modify the ALJ's recommendation and, instead, orders Appellant to be suspended for 180 days; for the reasons set forth, below.

First, the record reflects that RN Amanda Seibert, Appellee's Director of Nursing (DON), believed, apparently in error, that she had *no discretion* and was required to effectively recommend or institute Appellant's removal. This was because, DON Seibert believed, Appellee's "zero tolerance policy" mandated removal for a first offense. Hillside Country Living (Hillside) receives Medicaid and/or Medicare funding. Thus, DON Siebert was apparently under the impression that applicable federal guidelines allowed nothing short of removal for an offender's first and only violation of the policy.

A careful review of the Hillside's applicable provision, however, reveals that the policy (and the commensurate federal guidelines) did provide some discretion to the appointing authority. Indeed, the record reveals that this policy would have allowed the appointing authority to effectuate an appropriate and measured response to (what was here) a conditional threat uttered in circumstances that are unlikely to be replicated in the future.

Next, the record reflects that Appellant had been a long-term employee with no discernible discipline on her record. This, of course, included a record that was devoid of any history of violence or of any propensity to threaten same.

Further, the record reflects that Appellant seemed to feel a loyalty and a strong connection to Hillside. Appellant's grandmother was a long-term resident at Hillside. Moreover, Appellant visited

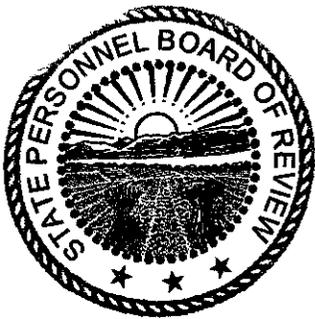
the residents on her days off and would even bring her dogs for visits to offer companionship and care to the residents, especially those room-bound.

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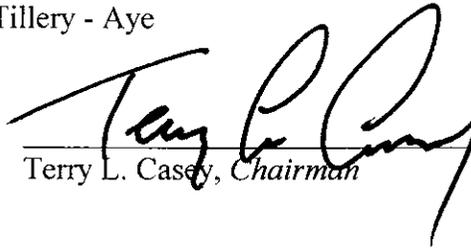
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Yet, when taking into consideration all the facts and circumstances of this situation, the Board finds that removal is too severe a punishment and, instead, modifies Appellant's instant discipline to a nine month suspension.

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Casey - Aye
Lumpe - Aye
Tillery - Aye


Terry L. Casey, *Chairman*

CERTIFICATION

The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitutes (the original/a true copy of the original) order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, May 22, 2015.


Clerk

NOTE: Please see the reverse side of this Order or the attachment to this Order for information regarding your appeal rights.

NOTICE

Where applicable, this Order may be appealed under the provisions of Chapters 124 and 119 of Ohio Revised Code. An original written Notice of Appeal or a copy of your Notice of Appeal setting forth the Order appealed from and the grounds of appeal must be filed with this Board fifteen (15) days after the mailing of this Notice. Additionally, an original written Notice of Appeal or a copy of your Notice of Appeal must be filed with the appropriate court within fifteen (15) days after the mailing of this Notice. At the time of filing the Notice of Appeal or copy of your Notice of Appeal with this Board, the party appealing must provide a security deposit to the Board. In accordance with administrative rule 124-15-08 of the Ohio Administrative Code, the amount of deposit is based on the length of the digital recording of your hearing and the costs incurred by the Board in certifying your case to court. The length of the digital recording, the costs incurred, the corresponding amount of deposit required, and the final date that the Notice of Appeal or copy of your Notice of Appeal and the Deposit will be accepted by this Board are listed at the bottom of this Notice. If a full or partial transcript of the digital recording has been prepared prior to the filing of an appeal, the costs of a copy of that certified transcript will be accepted by this Board; transcript costs will be listed at the bottom of this Notice.

IF YOU ELECT TO APPEAL THIS BOARD'S FINAL ORDER, THEN YOU MUST PROVIDE THE DEPOSIT LISTED BELOW AT THE TIME YOU FILE YOUR NOTICE OF APPEAL OR COPY OF YOUR NOTICE OF APPEAL WITH THIS BOARD. Please note that the law provides that you have fifteen (15) calendar days from the mailing of the final Board Order to file your Notice of Appeal or copy of your Notice of Appeal both with this Board and with the Court of Common Pleas. The fifteenth day is the date that appears at the bottom of this Notice.

METHOD OF PAYMENT: for all entities other than State agencies, payment of the deposit must be by money order, certified check, or cashier's check. State agencies are required to use the Intra-State Transfer Voucher (ISTV) system (OBM Form 7205), which must be processed prior to the filing of an appeal. To initiate an ISTV, State agencies may call the State Personnel Board of Review Fiscal Office at 614/466-7046.

IF YOU MAINTAIN YOU CANNOT AFFORD TO PAY THE DEPOSIT LISTED BELOW, THEN YOU MUST COMPLETE THE BOARD'S "AFFIDAVIT OF INDIGENCE" FORM. YOU CAN OBTAIN THAT FORM BY CALLING 614/466-7046. THE COMPLETED AFFIDAVIT MUST BE RECEIVED BY THIS BOARD ON OR BEFORE May 29, 2015. You will be notified in writing of the Board's determination. If the Board determines you are indigent, you will be relieved of the responsibility to pay the deposit to the Board. However, if the Board determines you are NOT indigent, then **YOU MUST FILE YOUR NOTICE OF APPEAL OR A COPY OF YOUR NOTICE OF APPEAL AND PAY THE DEPOSIT BY THE DATE LISTED BELOW.**

If you have any questions regarding this notice, please contact the Board at 614/466-7046.

Case Number: 2013-REM-10-0265

Transcript Costs: \$183.00 Administrative Costs: \$25.00

Total Deposit Required: * \$208.00

Notice of Appeal and Deposit Must
Be Received by SPBR on or Before: June 8, 2015

**STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW**

Laurie Cooley

Case No. 2013-REM-10-0265

Appellant

v.

February 5, 2015

Hillside Country Living
Williams County

Appellee

Marcie M. Scholl
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for record hearing on May 5, 2014. The record was held open for the submission of closing briefs until June 6, 2014. Present at the hearing were the Appellant, Laurie Cooley, represented by Catherine H. Killiam, Attorney at Law and Appellee Hillside Country Living designee Amanda Seibert, RN, Director of Nursing, represented by Eugene P. Nevada, Attorney at Law.

Appellant Cooley was removed from her position of Registered Nurse, effective October 14, 2013. The pertinent part of the Removal Order states as follows:

The reason for this action is that you have been guilty of Failure of good behavior and violation of any policy or work rule of the appointing authority. To wit: On or about September 28, 2013, You (sic) made threatening statements to a co-worker towards the director of Nursing. You stated the Director of Nursing would 'get what she has coming' and 'I can understand why people go into their workplace and shoot everyone with Uzis'. Such statements constitute failure of good behavior and are a violation of the appointing authority's work rule, Section 7.11, Workplace Violence.

Appellant Cooley filed a timely notice of her appeal with this Board. The subject matter jurisdiction of the Board was established pursuant to sections 124.03 and 124.34 of the Ohio Revised Code.

STATEMENT OF THE CASE

Appellant Cooley testified she was terminated from her position of RN at Hillside on October 14, 2013, and she is currently unemployed. She identified Appellee's Exhibit 1 as the notice of a pre-disciplinary conference, which she received and attended; Appellee's Exhibit 2 as the report from the Hearing Officer who conducted the pre-disciplinary conference; Appellee's Exhibit 3 as the Order of Removal which she received; and Appellee's Exhibit 4 as the letter she received placing her on administrative leave. Appellant Cooley agreed that she was held to a higher standard of conduct as a nurse and stated she was aware of the workplace violence policy. She identified Appellee's Exhibit 5 as a copy of that policy and confirmed she had seen it before. Appellant Cooley confirmed that the policy states that threats in the workplace will not be tolerated, that the term "violence" is defined within the policy and that the policy provides for termination of anyone found guilty of violating the policy. She also testified she knows of and understands what comprises a Group three offense, explaining that it is an offense which is of a serious enough nature to warrant termination on the first offense. Appellant Cooley also testified she was aware that threats could get her fired.

Appellee's Exhibit 6 was identified by Appellant Cooley as an acknowledgement signed by her that she received a copy of Employee Handbook and the Residents' Bill of Rights. Appellee's Exhibit 7 was identified as an Orientation checklist for Appellant Cooley, which she signed, showing the trainings she has attended. Appellee's Exhibit 9 was identified by Appellant Cooley as her signed acknowledgement that she received a copy of the Compliance Manual.

Appellant Cooley testified she and another co-worker discussed in the restorative office how workers' compensation works. She explained that a Restorative Nurse helps coordinate therapies and assists patients with walking and toileting programs. Ms. French was the Restorative Nurse who Appellant Cooley was talking to and they were the only ones present in the office. Appellant Cooley testified that during the conversation she began to cry and stated to Ms. French, "I wonder if people who go into the workplace and kill people with Uzis are on workers' compensation?" Appellant Cooley denied that she said "Amanda has it coming". She stated she had just heard a report about an army guy shooting up some place and she could not understand why someone would do that. She testified she wondered about workers' compensation since they had just been talking about it. Appellant Cooley testified she made the comment to relieve the stress she was feeling as it had been eight months or longer that she had been trying to get her workers' compensation claim approved and she was frustrated. In looking at the

transcript of the pre-disciplinary conference, Appellant Cooley confirmed she made the comment about the Uzi and that she regrets making it and did not think it was a threatening comment.

Appellee's next witness was Alisha French, currently employed at Brookview Healthcare but she previously worked at Appellee from March, 2010 to March, 2014, first as an LPN then as an RN. Ms. French testified she was working light duty due to being on workers' compensation on September 29, 2013 at Appellee. She worked a modified second shift, assisting with lunch and supper hours. Ms. French confirmed she knows Appellant Cooley, as they shared the restorative office space sometimes. On that day, Appellant Cooley asked Ms. French about a workers' compensation claim and an upcoming surgery. Ms. French told her it took approximately ten months for her claim to be approved and Appellant Cooley stated she could not wait that long, then she became tearful. She told Ms. French that Amanda was out to get her, stating that when she brought her big dog into the facility, Amanda instructed the staff to write about it. Ms. French testified that Appellant Cooley then said that she could see why people come into the workplace with Uzis and shoot people up and that Amanda had it coming to her.

Ms. French testified she did not think Appellant Cooley would really come into the workplace with an Uzi and search out Amanda, but how does she know? She didn't really know Appellant Cooley and in this day and age, she did not feel she could just ignore the comments. She felt the comments by Appellant Cooley were inappropriate since they were there to take care of people's loved ones. There were seventy-one beds in the facility plus the other staff and co-workers and she stated "you just never know". Ms. French testified the comments made her feel uncomfortable for both herself and Amanda. She stated she told her supervisor about the comments and her supervisor asked her to write a statement, which she did the next day and identified her statement as Appellee's Exhibit 9. Ms. French testified she was certain that Appellant Cooley said "Amanda has it coming" and she also talked about "Uzis".

On cross examination Ms. French testified her conversation with Appellant Cooley lasted about twenty minutes and she stated Appellant Cooley's comments about an Uzi were not in reference to workers' compensation. She stated the comments were of a general nature but made her feel uncomfortable to the point that she actually excused herself from the conversation and took her lunch break then. During her break, Ms. French stated she talked with Ms. Matthews about the conversation she had with Appellant Cooley. She testified she does not know Appellant Cooley personally and does not know her outside of work. Ms. French

stated she would have reported the comments even if she knew the person making the comments as they made her feel uneasy and uncomfortable. She testified she did not want to be the one who made the decision as to whether or not a person is dangerous, so that is why she reported the comments. Ms. French testified she finished out her shift that day but did not work at the nurse's station. She stated she could not remember if Appellant Cooley worked the next day or not.

Appellee's next witness was Amanda Seibert, Director of Nursing for approximately thirteen months. Ms. Seibert testified she is familiar with all of the Appellee's policies and explained that Appellee has a zero tolerance workplace violence policy per the federal government. This means there is no warning or second chance, as it is a "one strike and you are out" policy.

Ms. Seibert testified it was early Sunday evening, September 29, 2013, when the nurse manager on call, Ms. Matthews, called her at home to update her about the comments of Appellant Cooley. Ms. Seibert stated she then called Ms. French that evening to set up a face to face meeting the next day. Appellant Cooley was a nervous person and Ms. Seibert did not know what to expect and was a little apprehensive after the dog incident. She stated she has three young children and seventy-one residents that she is responsible for, with an average age of ninety or ninety-one. Ms. Seibert testified she was following policy and procedure as the past administrator was let go for not following policy and procedure and for not ensuring the safety of the residents and staff.

On cross examination Ms. Seibert testified Ms. Matthews contacted her on Sunday evening and told her she needed to talk to Ms. French to get the full story. Ms. Seibert stated she called Ms. French that evening and she was terrified of the comments she heard. She told Ms. Seibert that she did take Appellant Cooley's threats seriously and that is why she reported them. Ms. Seibert stated she felt Ms. Matthews should have called her immediately upon learning of the incident.

Ms. Seibert testified she has nothing to do with Appellant Cooley's workers' compensation claim, as the injury occurred prior to her being hired at Appellee and her job does not have any input into workers' compensation cases.

When asked about the incident with Appellant Cooley's dog, Ms. Seibert testified Appellant Cooley was off work one day sometime in August or so, and she brought her dog to the facility. Ms. Seibert was concerned about Appellant Cooley's handling of her dog as to whether or not it was in conflict with her medical restrictions of bending, pulling, pushing, etc. She felt that handling a sixty-five (65)

pound dog may be in conflict with those restrictions. She talked to her supervisor, Mr. Lord, and he told her to get statements from the staff. She then received a call informing her Appellant Cooley was upset and crying so she asked her to come to her office. When she got there, Appellant Cooley was upset, crying and shaking, so Ms. Siebert stated she sent her to the emergency room. Appellant Cooley did not express any angry words to Ms. Siebert.

Appellant Cooley testified she was not in any way angry with Ms. Siebert, as her anger was directed toward the workers' compensation system and her doctor. She did not blame Ms. Siebert for her workers' compensation travails. Appellant Cooley stated she was not angry or frightened about the dog incident, she just didn't know what the outcome of the incident would be. She talked with Ms. French about it and Ms. French told her to contact her doctor and ask if walking her dog was permitted under her restrictions. Appellant Cooley testified she later went to her doctor and obtained a prescription to walk her dog.

With regard to her removal, Appellant Cooley testified she received a message on her answering machine that she was not to report to work until she talked to Ms. Siebert. Her first reaction was that she no idea what to think. She called a friend and asked if anything had happened over the weekend and they talked for an hour and a half trying to think what she could have done. She did not know anything until she walked into the room where Ms. Siebert and Mr. Lord were. Appellant Cooley testified that in her nine (9) years of employment, she was never involved in any violence and that her own grandmother is a resident of Appellee. She stated she took her dog there to see a resident who never left the room, but the resident loves animals, so she took her dog for that person and others to see. She testified some of the residents have become like family, as some of them have been there the nine years she has.

Appellant Cooley denies that she said "Amanda has it coming to her". She stated her conversation with Ms. French took place around noon and after the conversation, she went out to the nurse's station and within a few minutes, Ms. French came to the nurse's station and began working on a computer and stayed for approximately ten minutes before she left. Appellant Cooley testified she saw Ms. French a few more times that day and she did not appear to be uncomfortable around her. Appellant Cooley stated she worked the following two days.

On cross examination Appellant Cooley testified she takes medicine for her heart, nerve pain, stomach, fibromyalgia and general pain.

Appellee recalled Ms. French to the stand as a rebuttal witness. Ms. French testified she worked on September 29, 2013, which was a Sunday, and Appellant Cooley did not work that day. She testified she remembers because she was kind of "freaked out" by the comments and she was not sure if Appellant Cooley was coming into work that day or not. She was glad to see that Appellant Cooley did not work that day, as she was afraid she was going to be there and she did not know what to expect.

FINDINGS OF FACT

After thoroughly reviewing the testimony of the witnesses and the documents entered into evidence, I find the following facts:

1. Appellant Cooley had been employed by Appellee as an RN for approximately nine (9) years at the time she was removed from her position, effective October 14, 2013. During her tenure she had not received any prior discipline.
2. Appellant Cooley, at the time of her discharge, was assigned to light duty due to a workers' compensation injury, as was Alisha French, a co-worker.
3. In September, 2013, Appellant Cooley and Ms. French were having a conversation about workers' compensation and Appellant Cooley asked Ms. French how long it took to get her workers' compensation approved. Ms. French told Appellant Cooley "about ten months", after which Appellant Cooley became visually upset and stated she could not wait that long. Appellant Cooley also stated something to the effect of "she could see why people come into the workplace with Uzis and shoot people up" and also something to the effect that "Amanda had it coming".
4. Ms. French became uncomfortable after hearing Appellant Cooley say those things, so she excused herself and later reported the conversation to her supervisor and completed a statement regarding the incident.
5. Appellee has a Workplace Violence policy contained in its Personnel Policy and Procedure Manual, along with Guidelines for Disciplinary Action and Penalties, both of which Appellant Cooley testified she was aware of and had signed an acknowledgement form, evidencing she had read and received the policies.

CONCLUSIONS OF LAW

In order for Appellee's removal of Appellant Cooley to be affirmed, Appellee had the burden of proving by a preponderance of the evidence the allegations contained in the order of removal. Appellee has met its burden.

There is no doubt that Appellant Cooley did say to Ms. French something along the lines of she "can see why people come into the workplace with Uzis and shoot people up". Regardless of whether Appellant Cooley made the statement in regard to people being on workers' compensation or not is immaterial. The disturbing part of the statement is the reference to coming into one's place of work with an Uzi and shooting people. Appellant Cooley denied that she said "Amanda has it coming to her", while Ms. French testified Appellant Cooley did make such a statement. Since the only two people privy to the conversation was Appellant Cooley and Ms. French, it becomes a case of "she said, she said". Ms. French is the more credible witness. Ms. French no longer works for Appellee and has no vested interest in the outcome of these proceedings. During their conversation, the subject of Appellant Cooley bringing her dog to work came up and since it did, it seems more plausible than not that Appellant Cooley was displeased about that situation and with Amanda and that she would have made the statement attributed to her. Appellant Cooley does have a vested interest in these proceedings and in wanting to stay on the good side of Ms. Siebert.

Appellant Cooley testified she had received, read and was familiar with all of Appellee's policies, including the Workplace Violence policy. Appellee asserted at hearing and in its closing brief that there was a zero tolerance policy in place and cited to section 7.11 of its Policy Manual. That section states as follows:

The safety and security of employees, clients, contractors, and the general public are of vital importance to Williams County and HCL. Therefore, threats, threatening behavior, or acts of violence made by an employee or anyone else against another person's life, health, well-being, family, or property will not be tolerated. Employees found guilty of violence will be subject to disciplinary action up to and including termination of employment.

Appellant Cooley signed an acknowledgment stating she received a copy of the handbook and will comply with all of the policies and procedures, including any changes to those policies and procedures applicable to her position. She also

signed an acknowledgment of receipt in March, 2013, of the Compliance Manual for Williams County and Hillside County Living's Compliance Program.

Appellant Cooley argued she did not have to be removed, as the disciplinary policy does not require removal, as it states "up to and including termination of employment." That is a true statement, but absent a showing of an abuse of discretion on the part of the appointing authority, this Board cannot substitute its judgment for that of the appointing authority. Appellant carried the burden of showing an abuse of discretion on the part of the appointing authority and Appellant failed to meet that burden.

Appellant Cooley was adamant that she did not state something to the effect of "Amanda has it coming to her". Whether she made such a statement or something similar is not relevant. Appellant Cooley admitted making the statement about "wondering if people who go into the workplace with Uzis are on workers compensation" or a statement similar to that. That statement, in and of itself, is enough to be perceived as a threat falling under Appellee's policies. It is unfortunate that the times have come to this point, but given the violent and sad events that have taken place in the country and around the world in the recent past, an employee can no longer make such a statement and pass it off as a joke. Just as no one can yell "fire" in a public place or stand in an airport and talk about a bomb, an employee cannot make a statement such as the one made by Appellant Cooley in the workplace. Every statement must be taken seriously by the employer, because as Ms. French stated, "you just never know any more". This is especially true when the working environment is a nursing home filled with elderly, possibly disabled residents who cannot move quickly or even defend themselves. The employer is under an obligation to that sector of the community to do everything it can to protect its vulnerable residents.

Therefore, it is my **RECOMMENDATION** that Appellee's removal of Appellant Cooley be **AFFIRMED**.



Marcie M. Scholl
Administrative Law Judge