

State Personnel Board, State of Colorado

Case No. 99 B 070

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

James A. Curtis

Complainant,

v.

Department of Human Services, Colorado Mental Health Institute at Pueblo,

Respondent.

Hearing on this matter was held on April 29 – 30, and May 13, 1999 before Administrative Law Judge G. Charles Robertson at the State Personnel Board Hearing Room, Room B-65, 1525 Sherman Street, Denver, CO 80203. The matter was deemed concluded and the record closed, as a result of post-hearing pleadings, on June 12, 1999.

MATTER APPEALED

Complainant, James A. Curtis (“Complainant” or “Curtis”) appeals the disciplinary termination imposed by Respondent, Department of Human Services, Colorado Mental Health Institute at Pueblo (“Respondent” or “CMHIP”).

For the reasons set forth below, the actions of Respondent are reversed. Complainant is to be reinstated with back pay and benefits. Neither party is entitled to an award of attorney fees pursuant to C.R.S. 24-50-125.5 (1998).

PRELIMINARY MATTERS

Respondent was represented by Beverly Fulton, Assistant Attorney General, 1600 West 24th Street, Pueblo, CO 81003. Complainant was represented by Carol M. Iten, Esq., 3333 Quebec Street, #7500, Denver, CO 80207.

1. Procedural History

The Notice of Appeal was filed December 31, 1998. Complainant appealed the termination of his employment from CMHIP. Complainant maintains that CMHIP's decision to impose discipline in the form of termination was arbitrary, capricious, and contrary to rule or law.

2. Motion for Summary Judgment

On April 13, 1999, Complainant filed a motion for summary judgment. Complainant argued that CMHIP violated Board Rule R8-8-3(1)(C), 4 CCR 801-1 (1998) with regard to imposing discipline because of its failure to institute progressive discipline. Further, it was argued that summary judgment was appropriate on behalf of Complainant because Complainant was not convicted of an offense involving moral turpitude and his criminal history did not affect Complainant's ability and fitness to perform his duties, and that his continued employment did not have an adverse effect upon CMHIP. Complainant requested attorney fees pursuant to C.R.S. 24-50-125.5 (1998).

Respondent filed a response to Complainant's motion arguing that Complainant had a pre-employment and post-employment criminal history. It argued that CMHIP did not have notice of his history, and therefore should not be prohibited from imposing discipline once it was made aware of the criminal background. Further, Respondent maintained that Curtis' criminal history did involve moral turpitude and therefore termination was warranted. Finally, Respondent argued that the criminal history impacted his ability to perform his duties at CMHIP and that it had an adverse effect on the agency.

The Administrative Law Judge issued an order on April 27, 1999 denying the motion.

3. Motion for Protective Order

At the time of hearing, Respondent moved for a protective order so as to prevent the identification of CMHIP's patients during the balance of the hearing. No objection was raised and the motion was granted. It was directed that any references to patients be by way of initials.

4. Motion to Sequester Witnesses

At the time of hearing, Respondent moved to have the witnesses sequestered. The motion was granted.

5. Witnesses

Respondent called the following witnesses in its case-in-chief: (1) Complainant; (2) Dr. Gregg Trautt, Director, Child and Adolescent Unit, Appointing Authority, CMHIP, 1600 West 24th Street, Pueblo, CO; (3) Connie Norman, Probation Officer, County of Pueblo, Pueblo, CO; and (4) Dr. Robert Hawkins, Superintendent, CMHIP, 1600 West 24th Street, Pueblo, CO. Respondent did not present a rebuttal case. Complainant did not call any witnesses in his case-in-chief.

6. Exhibits

The following exhibits were introduced by way of stipulation between the parties:

Exhibit #	Type
Exhibit 5	Performance Planning and Appraisal Form 7/1/97 to 7/1/98
Exhibit 7	Notice of R8-3-3 meeting and resulting Corrective Action dated 4/19/93 and 5/28/93 respectively
Exhibit 8	Notice of R8-3-3 meeting and resulting Corrective Action dated 9/8/98 and 9/21/98 respectively.
Exhibit F	Correspondence to James Curtis from Gregory M. Trautt, Appointing Authority
Exhibit I	Correspondence to Robert Hawkins from Denver Post 10/14/98

During Respondent's case-in-chief, the following exhibits were admitted into evidence over Complainant's objection.

Exhibit 6	CMHIP Policy 30.54: Change of Status Effective 4/29/94
Exhibit 9	Information re: 1995 Harassment Conviction including: Register of Actions–Misdemeanors; Intervention Correspondence; Court Orders; and Warrant for Failure to Pay (Pages 1-15 only)

7. Complainant's Motion for Directed Verdict

A. Standard

C.R.C.P. 50 provides in part: "a party may move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence." A motion for directed verdict should be granted only when the evidence has such quality and weight as to point strongly and overwhelmingly to the fact that reasonable persons could not arrive at a contrary verdict. See: *Jorgensen v. Heinz*, 847 P.2d 1981 (Colo. App. 1992), cert. denied. In passing upon a motion for directed verdict, a trial court must view evidence in the light most favorable to the party against whom the motion is directed, and every reasonable inference drawn from evidence presented is to be considered in the light most favorable to that party.

B. Complainant's Motion for Directed Verdict and Argument

At the close of Respondent's case-in-chief, Complainant moved for a directed verdict. Complainant renewed the arguments made in his pre-hearing motion for summary judgment. In addition, among the arguments made, Complainant identified that he had been an employee for 17 years and had good or commendable performance. He noted that he only had two corrective actions during that time. The corrective actions addressed issues of performance and Complainant demonstrated that he had been able to correct those deficiencies in performance. Complainant admitted that he had a criminal history but that such history was not relevant to his performance, that it was irrelevant in considering discipline because it was antiquated, and that C.R.S. 24-5-101 (1998) prevented him from being discriminated against for having such a history. Complainant maintained that C.R.S. 24-5-101, which speaks to the impact of criminal convictions involving moral turpitude on employment rights, demonstrates that his previous criminal history was not grounds for current discipline.

Complainant further argued that the reasons for discipline, as described by Dr. Trautt, failed to be grounds for discipline pursuant to Board rule. Complainant believed that he should not be disciplined for conduct that occurred while off-duty. Moreover, Complainant maintained that Respondent failed to meet its burden of proof to show by a preponderance of the evidence that Complainant's criminal history had an adverse effect on the agency, i.e., CMHIP. He argued that other employees in security positions were not terminated for previous criminal histories comparable to Complainant's history. Based on these arguments, Complainant requested the ALJ grant a directed verdict.

C. Respondent's Argument

In its response to the motion for directed verdict, Respondent incorporated its arguments from its response to the pre-hearing motion for summary judgment. Respondent emphasized that what is at issue is that patients need quality care and that Complainant was a direct care provider. As a result, because of his criminal history, Complainant was unable to provide quality care. Respondent stated that because of Complainant's history, and the fact that it was publicized in the Denver Post, patients were taunting Complainant during work. Respondent maintained that such an environment was not a quality environment for Complainant, the patients, or CMHIP. Most importantly, Respondent maintained that Complainant was still failing to comply with the law as a result of violating probation.

D. Ruling on Motion by ALJ

At the time of hearing, after having heard testimony by the witnesses listed above in Respondent's case-in-chief, having reviewed the record, and the issues in this matter, the administrative law judge denied the motion for directed verdict. Based on the standard outlined above and the need to interpret the evidence in a light most favorable to Respondent, the ALJ could not rule in favor of Complainant.

E. Judicial/Administrative Notice

Judicial and administrative notice is taken of applicable statute and case law, including C.R.S. 24-5-101 (1998).

F. Supplemental Authority

Respondent filed Respondent CMHIP's Submission of Supplemental Authority on June 2, 1999. Complainant filed Complainant's Response to Respondent CMHIP's Submission of Supplemental Authority. As a result, after consideration and review of the pleadings, the record was deemed to remain open until June 12, 1999. Respondent's Motion contained reference to a number of cases interpreting moral turpitude. The motion also recited a number of purported facts. Complainant objected to the introduction of these alleged facts. Any facts introduced by way of Respondent's submission are hereby stricken from the record.

ISSUES

1. Whether the act for which discipline was imposed occurred;
2. Whether the discipline imposed was within the range of reasonable alternatives;

3. Whether the appointing authority acted arbitrarily, capriciously, or contrary to rule or law; and,
4. Whether either party is entitled to an award of attorney fees pursuant to C.R.S. 24-50-125.5 (1998).

STIPULATED FINDINGS OF FACT

At the time of hearing, the parties stipulated to the following findings of fact:

1. Complainant’s performance ratings since 1992 included:

Date	Points	Rating
7/92	400	Commendable
7/93	300	Good
7/94	310	Good
7/95	310	Good
7/96	335	Good
12/16/95 to 7/1/96 (interim)	285	Good

2. Complainant began his employment with CMHIP on July 1, 1982.
3. During the course of his employment, Complainant was a Psychiatric Care Aide.
4. During his employment, Complainant failed to report any harassment claim against him to anyone within DHS’ personnel office in the Southern District.

FINDINGS OF FACT

(parenthetical refer to exhibits or witness’ testimony)

I. Respondent’s Background

1. CMHIP is a state institution responsible for providing mental health care to individuals residing in the state of Colorado. CMHIP has a number of different divisions including the Institute of Forensic Psychiatry (“IFP”), and the Child and Adolescent Treatment Center. (Trautt).
2. Some patients are committed to CMHIP involuntarily or as a result of the outcome of the criminal justice system and a finding of being not guilty by reason of insanity. Such patients can pose risks to the public, themselves, and others. (Trautt).

3. Patients may be diagnosed on one or more “axis” ranging from Axis 1 to Axis 4. Each axis represents a diagnosis helping to categorize types of mental illness ranging from personality disorders to medical conditions to high functioning individuals. The diagnostic system accounts for such disorders as post traumatic stress disorder, bipolar disorder, manic depressive behavior, anti-social disorders, borderline personality disorders, etc. (Trautt).
4. As a result of the mental illness or behavioral disorders, patients often attempt to manipulate other patients or staff in order to receive perceived benefits. (Curtis, Trautt).
5. CMHIP uses Psychiatric Care Aides (“PCAs”) otherwise known as psychiatric care technicians, within IFP. (Trautt). PCAs provide care to patients under the direction of a licensed professional. (Hawkins).
6. PCAs’ responsibilities include maintaining the patient milieu within IFP and the assigned wards. In addition, duties include: insuring a secure ward, observing patients, assisting patients in “mundane” functions, keeping patients under control, assisting patients in personal hygiene, and facilitating recreational activities for the patients. (Trautt). Duties also include transporting patients within CMHIP. (Curtis, Hawkins).
7. At the time of Complainant’s termination, patients were allowed to transport/accompany other patients, as if to chaperone patients. (Hawkins).
8. PCAs directly interact with patients. (Curtis). As a result, they can be classified as direct care providers. In the course of providing care, PCAs are expected to model appropriate behavior. Modeling is considered a therapeutic tool. (Trautt, Hawkins).
9. In addition, PCAs are the individuals who interact with patients on a daily basis. They are responsible for disclosing/reporting changes in patient behavior to licensed treatment staff. As a result, a high value is placed on PCAs’ credibility and their need to accurately and truthfully report patient activity. (Trautt).
10. PCAs are not responsible for providing therapeutic or treatment services.
11. CMHIP’s budget and funding sources are linked to an accreditation process. For example, the Joint Accreditation of Health Care Associations provides for accreditation of CMHIP allowing CMHIP to receive funding. (Hawkins). The Health Care Finance Administration, in the course of providing funding, relies upon accreditation.

12. Besides being used as a tool for funding, the accreditation process facilitates public confidence in CMHIP and supports services to patients, patient families, and the public.
13. The superintendent of CMHIP is Robert Hawkins. Hawkins has been a state employee for 40 years, starting while he was in high school. While employed at CMHIP, Hawkins held positions as a PCA, a social worker, an occupational therapist assistant, a team leader, a patient advocate, and assistant supervisor. He has a bachelor of science from USC and a masters degree in social work from the University of Denver. He is nationally certified in social work and is a state licensed social worker. Hawkins has participated in a number of community boards including the Colorado Committee on Education, and the city civil service system. (Hawkins).
14. Hawkins' responsibilities include insuring the quality of mental health services being provided by CMHIP.
15. Dr. Gregory Trautt was the appointing authority at CMHIP with regard to this matter. (Hawkins, Trautt). Trautt has a masters degree and Ph.D. in clinical psychology, with an additional masters degree in education. Prior to receiving his doctorate, Trautt completed 2000 hours of supervised practice in mental health care centers. He has been chair of graduate programs. Initially, Trautt was a staff psychologist at CMHIP and worked in what is now called IFP. Subsequently, at the time of this incident, Trautt was in charge of the Child and Adolescent Treatment Center. Trautt has a clinical practice involving forensics and the interface between law and psychology. (Trautt).

II. Complainant's Background

16. Complaint has been involved in the criminal justice system since the 1970s. His criminal history includes the following:

Date	Charge	Outcome
Prior to 1995	<ul style="list-style-type: none"> • Driving Under the Influence • 3rd Degree Assault • Misrepresenting his identity to law enforcement during a traffic stop 	Not determined
1995	<ul style="list-style-type: none"> • Harassment involving striking spouse(class 3 misdemeanor) 	Sentenced to probation for one year; attendance of Domestic Violence

1997	<ul style="list-style-type: none"> • Failure to complete domestic violence classes; violation of probation • Removal of ankle bracelet during in-home detention; violation of probation 	Program (36 classes) Revocation of probation: 10 days in-home detention & 2 additional days of in-home detention beyond sentence
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(Curtis, Exhibit 9).

17. Complainant committed at least two (2) additional acts of harassment or 3rd degree assault during the 1970s and 1980s. One such instance involved a bar-room brawl. Another incident involved an altercation with his father-in-law. (Trautt, Curtis).
18. During the same period of time, Complainant admitted to having problems with alcohol. Such problems, while identified and controlled for long periods of time, re-surfaced in 1995. (Curtis).
19. Curtis disclosed to his nursing supervisor that he had been having issues with the criminal justice system in or around 1995. (Curtis, Trautt).
20. Complainant received a corrective action on May 28, 1993 for (1) allowing insufficient staff coverage while on-duty at Cottage D of the CMHIP facility; and (2) for mis-carrying a patient. In sum, Complainant left Cottage D for up to 20 minutes, leaving only one other individual to supervise/maintain the patient population within Cottage D. He also held and carried a patient by the ankles for some brief period of time. The corrective action clearly pointed out that the supervisor was concerned about supervision of patients and appropriate methods for handling patients. (Exhibit 7). Complainant was instructed to insure that he had permission to leave the cottage by the supervisor in the future and to handle patients in a manner which assures their safety and personal dignity. (Exhibit 7).
21. Complainant received a second corrective action in September 1998. The corrective action was issued as a result of Complainant failing to accurately document patient care on Accountability Sheets. Complainant was directed to meet with his supervisor regularly to obtain counseling and to demonstrate proficiency in using Accountability Sheets. (Exhibit 8).

III. Incidents Related to Imposition of Discipline

22. In October 1998, correspondence was received from Kirk Mitchell, a reporter for the Denver Post newspaper. The correspondence identified concerns about employees with criminal backgrounds working at CMHIP. (Exhibit I). The letter listed over 40 employees with criminal backgrounds.
23. Complainant was identified in the correspondence as having a criminal background. (Exhibit I).
24. Subsequently, Hawkins assembled his management staff, including Trautt, and asked that they inform the identified employees that the Denver Post had identified the employees as having criminal backgrounds. (Hawkins). While Hawkins was unclear as to whether the newspaper's interest (and subsequent articles) adversely impacted CMHIP, he was concerned about the potential impact and the community-at-large's perception. He directed that the management staff was to take either corrective or disciplinary action after having reviewed the details of each circumstance.
25. Hawkins was concerned that such employees, because of their backgrounds, would negatively impact CMHIP and the care provided to patients. Hawkins believed that any direct care employees, with criminal histories involving a violent personal life, would compromise treatment by exposing the patients to violent employees. (Hawkins). He was concerned that employees with criminal histories would not be credible and honest in reporting observations of the patient population. And, he was concerned that such employees would not be appropriate models.
26. Hawkins acknowledged to his management staff that if an undefined period of time had elapsed since an employee had been involved in criminal behavior, "redemption" was appropriate and that pro-social behavior could overcome previous criminal histories. It was also conveyed to management staff that in imposing discipline or corrective action, it should be noted whether an employee demonstrated compliance with court orders. This, in essence, would amount to good modeling behavior. (Hawkins).
27. Hawkins did not order his staff to terminate all employees listed in the correspondence or otherwise identified as having a criminal backgrounds. (Hawkins). Instead, Hawkins asked that investigations be done, using Hospital police, interviewing patients, etc. to determine the seriousness of the criminal behavior.
28. Hawkins allowed the appointing authorities to make decisions re: discipline, based on the above criteria. As a result, various appointing authorities within CMHIP collected information and made determinations as to discipline individually.

29. In one instance, a security guard, charged with 2nd degree kidnapping, false imprisonment, and 3rd degree assault continued to work at CMHIP¹. Additionally, this employee had been imprisoned at the Dept. of Corrections in the mid-1980s for robbery. He received no discipline during the current time frame because his record demonstrated he had satisfied the terms of his sentence. (Hawkins).
30. In another instance, an employee who had been convicted of 3rd degree assault was also found to have been experiencing psychotic symptoms. This employee was also a PCA. (Trautt). This employee was not terminated but was given a corrective action stating, in part, that he was to remain free of criminal behavior. (Trautt).
31. A number of meetings occurred once the newspapers became involved. Information was exchanged between Hawkins' management staff. Concerns were raised regarding the publicity's impact on the hospital and its staff.
32. Subsequent to Hawkins delegating appointing authority, it was clear that not every individual identified on the list of employees with criminal backgrounds was investigated. It was perceived that some of the employees had backgrounds which did not warrant further investigation. (Trautt). With other employees, the CMHIP police conducted investigations.
33. Trautt was delegated appointing authority with regard to Complainant. (Trautt). Trautt reviewed information including police reports, information from CMHIP police, and Complainant's personnel record. Trautt reviewed the entire criminal record of Complainant but focused on incidents in 1995 involving an initial charge of third degree assault. (Trautt).
34. It was determined that Complainant had been convicted of committing harassment pursuant to C.R.S. 18-9-111(1)(a) in 1995. The conviction was the result of a plea agreement, reducing the initial 3rd degree assault charge. Complainant was sentenced to probation and to attend 36 classes on domestic violence. (Exhibit 9, Curtis, Trautt, Norman).
35. Trautt further confirmed that Complainant had failed to successfully complete his sentence of probation and failed to attend all of the domestic violence classes. As a result, Complainant was sentenced to in-home

¹ Security Guards are not the equivalent to CMHIP Police. Security Guards do not interact regularly with patients and occupy posts apart from patient wards. Responsibilities are to observe the various wards at IFP and in the event of security problems, intervene. Guards do not conduct investigations or regularly transport patients.

detention. However, Complainant's ankle bracelet was detached/removed during his in-home detention and he was sentenced to an additional 2 days of in-home detention. The circumstances of the bracelets removal are unclear. (Exhibit 9, Curtis, Trautt, Norman).

36. The information reviewed by Trautt further revealed that Complainant failed to abide by the 2 additional days of in-home detention and was incarcerated for a brief period of time. (Exhibit 9, Curtis).
37. During the relevant time frame, assault in the third degree was defined as:

A person commits the crime of assault in the third degree if he knowingly or recklessly causes bodily injury to another person or with criminal negligence he causes bodily injury to another person by means of a deadly weapon. Assault in the third degree is a class 1 misdemeanor.

C.R.S. 18-3-204.

38. Harassment was defined, in relevant part, as:

a person commits harassment if, with intent to harass, annoy, or alarm another person, he or she: . . . strikes, shoves, kicks, or otherwise touches a person or subjects him to physical contact

C.R.S. 18-9-111(1)(a). Harassment is a class 3 misdemeanor, the lowest type of misdemeanor. Colorado Revised Statute 18-1-106 provides that the minimum sentence associated with a class 3 misdemeanor is a \$50 fine. The statute further provides that misdemeanors that present an extraordinary risk of harm to society shall include the following: assault in the 3rd degree, sexual assault in the 3rd degree, child abuse, and continued violations of restraining orders involved in domestic violence. See: C.R.S. 18-1-106(3)(b) (1998).

39. In reviewing the information, Trautt did not consider issues involving whether or not Complainant had disclosed his change in status (i.e., arrest) pursuant to CMHIP's Policy 30.54. Trautt considered the fact that Complainant had been being treated for depression since 1996.
40. In determining his course of action, Trautt reviewed Curtis' personnel file and concluded that he had always been rated good or commendable. He also noted 2 corrective actions issued within 2 years. Trautt determined that the terms of one of the corrective actions had been satisfied by Complainant. As far as Trautt was concerned this demonstrated that Curtis could comply with taking corrective steps in behavior. Trautt further believed that the second corrective action would have been complied with

had Curtis been given an opportunity to continue his employment. (Trautt).

41. Trautt testified that the imposition of discipline was not related to performance, and that no negative inferences were drawn from the corrective actions. (Trautt).
42. Trautt noted during the investigation that at least one employee had taunted Complainant, teasing him with regard to the criminal history.
43. An R8-3-3 meeting was held on December 10, 1998 with regard to imposing discipline upon Complainant. (Exhibit F).
44. On December 21, 1998, a letter imposing disciplinary termination was issued by Trautt. The letter noted that Curtis had a history of criminal convictions, including one of harassment in 1995 involving domestic abuse. It also noted that Complainant violated the conditions of his probation in that case in 1996. Trautt concluded that such behavior constituted “final conviction of offenses involving moral turpitude which could adversely affect, and has adversely affected, [his] ability and fitness to perform the duties of [his] job, and which would have an adverse effect upon CMHIP and DHS should [he] continue employment.” (Exhibit F).
45. At the time discipline was imposed, State Personnel Board Rule R8-3-3(C), 4 CCR 801-1 (1998) was in effect. This rule provides, in part:

Causes for Administering Disciplinary Actions. Disciplinary actions may be administered for the following causes:

1. Failure to comply with standards of efficient service or competence.
2. Willful misconduct may include, but is not limited to, either a violation of these Rules or of the rules of the agency of employment . . .
3. Willful failure to perform duties assigned . . . (iii) Inability to perform duties assigned includes being **charged** with a felony or any other offense involving moral turpitude, when such action or offense adversely affects the employee’s ability or fitness to perform duties assigned or has an adverse effect on the agency should the employee continue such employment . . .
4. **Final conviction** of a felony or any **other offense of moral turpitude**, when such action or offense **could** adversely affect the employee’s ability or fitness to perform the duties of the job or has an adverse effect on the agency should the employee continue such employment.

(Emphasis added). Said rule is derived from Colo. Const., article XII, section 13 and C.R.S. 24-50-125 (1998).

46. State Personnel Board Rule R8-3-1, 4 CCR 801-1 (1998) provides in part:
- B. The decision to correct or discipline an employee shall be governed by the nature, extent, seriousness and effect of the act, error or omission committed; the type and frequency of previous undesirable behavior; the period of time that has elapsed since a prior offensive act; the previous performance evaluation of the employee; an assessment of information obtained from the employee; any mitigating circumstances; and the necessity of impartiality in relations with employees.
 - C. In the case of a certified employee, unless the conduct is so flagrant or serious that immediate disciplinary action is appropriate, corrective action shall be imposed before resorting to disciplinary action.

46. Effective July 1, 1999, C.R.S. 27-1-110, entitled Employment of personnel—screening of applicants—disqualifications from employment, was amended. The amended statute provides, in part, as follows:

The general assembly hereby declares that, in accordance with section 13 of article XII of the state constitution, for purposes of terminating employees in the state personnel system who are finally convicted of criminal conduct, offenses involving moral turpitude include, but are not limited to, the disqualifying offenses specified in subsection (7) of this section. . .

(7)(c) (II) Any misdemeanor, the underlying factual basis of which has been found by the court on the record to include an act of domestic violence, as described in section 18-6-800.3 C.R.S.²

(11)(a) An employee or contracting employee who is disqualified for conviction of an offense specified in paragraph (c) of subsection (7) of this section may submit a written request to the executive director for reconsideration of the disqualification and review of whether the person poses a risk of harm to vulnerable persons. In reviewing a disqualification, the executive director shall give predominant weight to the safety of vulnerable persons over the interests of the disqualified person. The final determination shall be based upon a review of:

- (I) The seriousness of the disqualifying offense;

² Section 18-6-800.3, C.R.S. defines “domestic violence” as an act of violence upon a person with whom the actor is or has been involved in an intimate relationship.

- (II) Whether the person has a conviction for more than one disqualifying offense;
- (III) The vulnerability of the victim at the time of the disqualifying offense was committed;
- (IV) The time lapse without a repeat of the same or similar disqualifying offense;
- (V) Documentation of successful completion of training or rehabilitation pertinent to the disqualifying event;
- (VI) Any other relevant information submitted by the person.

DISCUSSION

I. INTRODUCTION

Certified state employees have a property interest in their positions and may only be terminated for just cause. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule R8-3-3, 4 CCR 801 (1998) and generally includes: (1) failure to comply with standards of efficient service or competence; (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment; (3) willful failure or inability to perform duties assigned; and (4) final conviction of a felony or any other offense involving moral turpitude.

In this disciplinary action of a certified state employee, the burden of proof is on the **terminating authority, not the employee**, to show by a preponderance of the evidence that the acts or omissions upon which discipline was based occurred and just cause existed so as to impose discipline. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

In *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987), the Supreme Court of Colorado held that:

Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors including: the opportunity and capacity of a witness to observe the act or event, the character of the witness, prior inconsistent statements of a witness, bias or its absence, consistency with or contradiction of other evidence, inherent improbability, and demeanor of witnesses. Colorado Jury Instruction 3:16 addresses credibility and charges the fact finder with taking into consideration the following factors in measuring credibility:

1. A witness' means of knowledge;

2. A witness' strength of memory;
3. A witness' opportunity for observation;
4. The reasonableness or unreasonableness of a witness' testimony;
5. A witness' motives, if any;
6. Any contradiction in testimony or evidence;
7. A witness' bias, prejudice or interest, if any;
8. A witness' demeanor during testimony;
9. All other facts and circumstance shown by the evidence which affect the credibility of a witness.

II. Parties' Arguments

At the close of hearing, Respondent made a number of arguments in support of its decision to impose discipline, in the form of termination, upon Complainant. Among those arguments, Respondent incorporated all of its arguments made in response to the Complainant's motion for summary judgment. In addition, Respondent maintained that the conduct of Curtis was so serious or flagrant as to warrant the imposition of discipline. Respondent stated that the acts for which discipline was imposed, the "offenses," constituted moral turpitude. It noted that Curtis did not satisfactorily complete his initial probation, demonstrating on-going problems and lack of credibility. CMHIP also noted that it had received a great deal of publicity with regard to this matter and that it could suffer an adverse effect. The impact could be in terms of providing patient care as well as fiscally.

Complainant, incorporating his arguments made in the motion for directed verdict, stated that Board rules govern this proceeding and that the application of progressive discipline, if any discipline is imposed at all, is appropriate. Moreover, Complainant maintained that Respondent failed to meet the burden of proof that Complainant committed the acts for which discipline was imposed, i.e. conviction of an offense of moral turpitude. Complainant maintained that Respondent did not show by a preponderance of evidence that a cause for administering disciplinary action existed. Complainant further argued the fact that other employees, having committed other criminal acts and having demonstrated psychotic behavior, were not disciplined and that any discipline imposed on Curtis was thereby arbitrary and capricious. Complainant cited the state's policy, as embodied in statute, of not discriminating against individuals who have previous felony convictions. Finally, Complainant points out that his performance over 17 years had been good or commendable and that at no time had his credibility or trustworthiness been questioned.

III.

A.

In this case, Respondent has the burden to show by a preponderance of the evidence that: (1) Complainant engaged in the acts for which discipline was imposed; (2) the discipline imposed was within the range of reasonable alternatives available to the appointing authority; and (3) the appointing authority did not act arbitrarily, capriciously, or contrary to rule or law. Respondent failed to meet its burden.

As demonstrated by the evidence, Respondent terminated Complainant on the grounds that Curtis had been convicted of committing an offense involving moral turpitude and that such a conviction could either adversely affect his performance or adversely impact CMHIP. Respondent's own appointing authority testified that Curtis' performance was not the reason he was terminated from employment. Therefore, a two step analysis must be utilized to determine if Complainant could be appropriately disciplined. First, it must be determined if Complainant was convicted of an offense of moral turpitude. Second, it must be determined if the result of such a conviction could impact either Curtis' performance or adversely affect CMHIP.

1. Crimes of Moral Turpitude

Crimes of moral turpitude are not easily defined within the state of Colorado. Black's Law Dictionary, 5th Ed. (1979) defines "moral turpitude" as:

The act of baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or to society in general, contrary to accepted and customary rule of right between man and man. . .

[An] act or behavior that gravely violates moral sentiment or accepted moral standards of a community and is a morally culpable quality held to be present in some criminal offenses as distinguished from others. . .

The quality of a crime involving grave infringement of the moral sentiment of the community

Clearly, this is a very general definition of moral turpitude.

The definition provides that not all crimes constitute acts of moral turpitude. Moral turpitude has been defined in cases involving attorney licensure. For instance, prior to 1993, lawyers were subject to discipline for engaging in acts which constituted moral turpitude. See: *People v. Espe*, 967 P.2d 159 (Colo. 1998). This was redefined in 1993 in such a way so as to not reference

moral turpitude but, rather, to reference attorney misconduct with regard to offenses concerning some matters of personal morality, such as adultery and comparable offenses. See: *Comment*, Rule 8.4, Misconduct, Rules of Professional Conduct. In one case involving an attorney who had committed sexual assault, it was held: “although not classified as a felony, third degree sexual assault is a crime of moral turpitude, and is a grave offense for lawyer discipline purposes. *People v. Brailsford*, 933 P.2d 592 (Colo. 1997). It has been held by the Colorado Supreme Court that attorney misconduct concerning the trafficking in illegal drugs is criminal conduct that involves moral turpitude and demands the most severe discipline. *People v. Young*, 732 P.2d 1208 (Colo. 1987). Thus, prior to 1993, certain specific acts were defined, through case law, to include moral turpitude. Subsequently, specific acts were identified through rule and precedent to parallel the previous definition of moral turpitude.

A number of types of criminal conduct have been specifically interpreted to involve moral turpitude including: theft, conspiracy to commit theft, fraud, third degree sexual assault; sexual crimes in general; manufacturing of “speed”; defrauding the federal government; and selling morphine. See: *People v. Buckley*, 848 P.2d 353 (Colo. 1993); *People ex. Rel. Atty. Gen. V. Heald*, 229 P.2d 665 (Colo. 1951); *People v. Martin*, 897 P.2d 802 (Colo. 1995); *People v. Pozo*, 712 P.2d 1044 (Colo. App. 1985); *People v. Wilson*, 490 P.2d 954 (Colo. 1971); *People v. Gibbons*, 403 P.2d 434 (Colo. 1965); and *White v. Andrew*, 197 P. 564 (Colo. 1921).

There are two items which cannot be ignored in interpreting moral turpitude with regard to this matter. First, it must be noted that none of the cases cited above link crimes of moral turpitude to persons who habitually violate the law. Second, prior to July 1, 1999, Colorado statute failed to sufficiently define moral turpitude vis-à-vis misdemeanors. Rather, as embodied in C.R.S. 18-1-106, certain misdemeanors were noted as posing an extraordinary risk of harm to society including assault in the 3rd degree, sexual assault, child abuse, and violations of restraining orders in domestic violence cases.

2. Complainant’s Actions in 1995

Given the above discussion of what constitutes moral turpitude and poses extraordinary risks to society, and the crimes generally associated therewith, it cannot be concluded based on the evidence presented that Complainant’s conviction in 1995 constituted a conviction of an offense of moral turpitude. While Complainant’s behavior was criminal in nature, a charge of harassment cannot be interpreted to involve moral turpitude. Nor can a final conviction of harassment be interpreted to involve moral turpitude. In order for the harassment conviction to be interpreted as an offense of moral turpitude, Respondent would have had to demonstrate that the offense was so base, vile, or depraved as to violate societal norms. Respondent did not demonstrate that the act of harassment violated moral sentiment or the accepted moral standards

of the community. Nor did Respondent demonstrate that the conviction of the offense of harassment should be considered the equivalent of a conviction of theft, fraud, third degree sexual assault, or the trafficking of narcotics. Respondent failed to meet its burden.

For the same reasons cited above, it cannot be concluded that because Complainant failed to initially complete his probation successfully, that Complainant engaged in acts of moral turpitude. Complainant was not finally convicted of an offense of moral turpitude.

Certainly, the Board does not condone Complainant's criminal behavior. However, the Colorado Constitution, the Colorado Revised Statutes, and Board rules provide for discipline only for convictions of criminal acts that are either defined as felonies or involve moral turpitude. The state legislature has only recently addressed this issue. Effective July 1, 1999, "moral turpitude" is better defined in relation to acts and criminal convictions of employees of DHS. Yet, in this instance, such a definition is not retroactively applicable to the actions of the appointing authority in December 1998. Allowing the statute to be retroactive would be to increase Curtis' liability for past conduct and would impair his vested property right in state employment. See: Colo. Const. art. II, sec. 11, *Valerio v. HMO Colorado, Inc.*, 957 P.2d 1057 (Colo.App. 1998) (To determine whether retroactive application should be given, a court must analyze when the new provision attaches new legal consequences to events completed before its enactment. It must determine whether the new rule would impair rights a party possessed when he or she acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. And, retroactivity is a matter to be guided by traditional considerations of fair notice, reasonable reliance, and settled expectations). But see: *Shell Western E&P, Inc. v. Dolores County Bd. of Com'rs.*, 948 P.2d 1002 (Colo. 1997) (for legislation to be given retroactive effect without being unconstitutional, it must be clearly the intent of the General Assembly to do so, but that intent need not be explicitly expressed in the legislation).

Even if this recent legislation was applicable, an employee may be allowed to continue his employment within DHS upon the showing of certain criteria to the executive director of DHS. With regard to Complainant, Respondent failed to show by a preponderance of evidence that there was an examination of those elements by the executive director. If the statute were to apply to the appointing authority, it is also not clear that the appointing authority considered all of these criteria. The appointing authority relied primarily on the 1995 conviction. And, while testimony was proffered on the issue of modeling on the behalf of CMHIP patients, little or no testimony was proffered to support that Complainant's conviction threatened the **safety** of patients. Performance was also not considered in this matter and under the newly defined criteria, performance would constitute relevant information the executive director of DHS would have to consider. Thus, even if the intent of the new legislation was to be

applied, it cannot be assumed that Curtis, having been convicted of harassment, should be subject to disciplinary termination.

3. Potential Adverse Impact on CMHIP

At the time of his termination, the Colorado Constitution, state statute and Board rules embodied policy which permitted the imposition of such discipline if an employee had been convicted of a felony or an offense of moral turpitude which COULD adversely affect the agency. In this instance, Complainant was not convicted of an offense of moral turpitude. As a result, it is not necessary to engage in the analysis as to whether or not there could have been an adverse impact on CMHIP. The facts support that CMHIP could suffer an adverse effect when an employee engages in offenses of moral turpitude. However, the law provides in this instance that such an analysis is futile given that the prerequisite conviction had not occurred.

B.

With regard to the issue of attorney fees, Board Rule R-8-38, 4 CCR 801 (1998) provides, in part, that attorney fees and costs may be assessed upon the final resolution of a personnel action if the action is found to have been frivolous, made in bad faith, was malicious or used as a mean of harassment, or was groundless. In this instance, this personnel action cannot be deemed frivolous. A rational argument based on the evidence was presented by Respondent. That argument consisted of CMHIP believing that the offenses of Complainant and for which he was convicted involved moral turpitude. Additionally, Respondent provided significant evidence that an employee convicted of such offenses could adversely impact CMHIP. No evidence was introduced or solicited to demonstrate that the personnel action was made in bad faith, was malicious, or used as a means of harassment. In determining if the matter was groundless, one must examine whether or not a party offered or produced ANY competent evidence to support its position. In this matter, Respondent did offer some competent evidence to support its action.

CONCLUSIONS OF LAW

1. Complainant did not engage in the acts for which discipline was imposed.
2. The discipline imposed was not within the range of reasonable alternatives available to the appointing authority.
3. The actions of the appointing authority were arbitrary, capricious, and contrary to rule or law.
4. Neither party is entitled to an award of attorney fees pursuant to C.R.S. 24-50-125.5 (1998).

ORDER

Complainant is to be reinstated to his former position with no loss in seniority or privileges. He is to be awarded back pay and benefits.

Dated this 26th
Day of July, 1999.

G. Charles Robertson
Administrative Law Judge