STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 97B026

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROSE ZABELVEITIA,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,
PUEBLO REGIONAL CENTER,

Respondent.

The hearing in this matter was held on March 10, 1997, in Pueblo, CO before Administrative Law Judge (ALJ) Margot W. Jones. Respondent appeared at hearing through Stacy Worthington, assistant attorney general. Complainant, Rose Zabelvietia, was present at the hearing and was represented by Darrol Biddle, attorney at law.

Respondent called the following employees of the Department of Human Services, Pueblo Regional Center (PRC) to testify as witnesses at hearing: Joanne Solis; Mary Diane Torres; Herb Brockman; Rick Esquibel; David Colagrosso; and Lynn Coleman. Respondent also called as a witness at hearing J.R., a consumer who resides at PRC.

Complainant testified in her own behalf and called the following employees of PRC to testify at hearing: Denise Chiarito; Judi Espinoza; Charles DeVries; Toni VanZandt; Becky Valdez; Nancy McDonnell; B.J. Maestas Reid; Janet Tooker; and Maggie Moseley.

Respondent's exhibits 1 through 3 and 13 were admitted into evidence without objection. Respondent's exhibits 4, 7, 10 through 13 were admitted into evidence over objection. Complainant did not offer exhibits into evidence at hearing.

MATTER APPEALED

Complainant appeals the termination of her employment for alleged patient abuse and wilful misconduct.

ISSUES

1. Whether complainant engaged in the acts for which discipline was imposed.

2. Whether the conduct proven to have occurred constitutes violation of PRC policy and State Personnel Board Rules.

3. Whether the decision to terminate complainant's employment was arbitrary, capricious, or contrary to rule or law.

4. Whether either party is entitled to an award of attorney fees.

PRELIMINARY MATTERS

1. In order to protect the rights of PRC consumers reference is made to them in this decision by their initials.

2. On October 28, 1996, respondent moved to quash a subpoena for medical records. Respondent contended that the patient records are confidential and privileged under section 13-90-107(1)(d) and (g) C.R.S. (1987 and 1996 Cum. Supp.) and section 27-10.5-120 C.R.S. (1996 Cum. Supp.). Complainant responded to the motion to quash arguing that the motion should be denied. Complainant contended that she is deprived of due process by respondent's refusal to produce consumers' medical records. Complainant maintained that this information about the consumers accusing her of abuse would establish that the consumers are neither competent nor credible witnesses.

On December 10, 1996, respondent was directed to show cause why the motion to quash should not be denied. In the order to show cause, respondent was directed to explain why in two cases pending before the ALJ, *Montoya v. Department of Human Services,* case numbered 96B160, and *DeHerrerra and Durkin v. Department of Human Services*, case numbered 97B006C, respondent called as witnesses at hearing consumers and PRC staff to testify about the consumers' medical diagnosis and treatment. Respondent was directed to file a response to the order to show cause explaining why cases involving consumers from the same Department of Human Services facility should be treated differently in term of respondent's obligation to provide access to the consumer's medical records concerning treatment and diagnosis.

On January 10, 1997, respondent responded to the order to show cause stating that different assistant attorneys general represented the department in the cases where information from the consumers' medical record was used at hearing. Respondent

contended that the fact that an attorney for respondent makes use of consumers' medical records should not open the door for complainant's access to the records in this case. Respondent finally maintained that providing access to the consumers' medical records was contrary to the statutory provisions.

On January 14, 1997, the motion to quash was granted on the grounds that access to the records is privileged and confidential under section 13-90-107(1)(d) and (g) C.R.S. (1987 and 1996 Cum. Supp.) and section 27-10.5-120 C.R.S. (1996 Cum. Supp.).

3. At hearing on March 10, 1997, complainant moved the ALJ to enter an order directing respondent to produce consumer medical records for J.R. and R.G. (a consumer who is purported to have corroborated J.R.'s allegation of abuse). Respondent contended that the consumers' records are confidential and that they were not reviewed by the appointing authority in making the decision to terminate complainant's employment. Respondent maintained that one "case note" was reviewed by the appointing authority in the course of the disciplinary process. Respondent contended that the "case note" is confidential and privileged, but, if ordered, it would be produced for complainant.

Respondent was directed to provide to complainant the "case note" used by the appointing authority during the disciplinary process.

FINDINGS OF FACT

1. Rose Zabelveitia (Zabelveitia), the complainant, was employed by the PRC from September, 1978, to September, 1996, as a developmental disabilities technician (DD tech). Zabelveitia was assigned to work at a residential treatment facility, Maher House. The appointing authority for Zabelveitia's position was Herb Brockman, residential director at PRC.

2. As a DD tech, Zabelveitia was responsible for the care of the consumers at Maher House. On July 24, 1996, Zabelveitia worked the third shift. At this time, there were eight consumers residing at Maher House. Five of the consumers required total care and three consumers were largely self sufficient. Consumer J.R. resided at Maher House during this period.

3. J.R. is a developmentally disabled individual. She is a middle age female who has limited language skills. J.R. was known to be vindictive, very volatile, jealous of other consumers and staff, she requires lots of one on one attention, she can become

verbally threatening and assertive, and she is known to make false accusations about staff members prior to July 24, 1996, and thereafter.

4. J.R. reported that on July 24, 1996, Zabelveitia grabbed her by the neck and pushed her against a wall at Maher House. J.R. further reported that Zabelveitia called J.R. a "cavrona", or bitch in Spanish. J.R. further reported that she warned Zabelveitia that she would report her conduct to another staff member. J.R. reported that Zabelveitia replied, "I don't give a shit who you tell."

5. On July 24, 1996, J.R. reported her allegation of abuse to Joan Solis, case management director, and Diane Torres, internal investigator. On July 27, 1996, J.R. reported the alleged abuse to Lynn Coleman, a clinical behavior specialist at PRC.

6. On July 24, 1996, Mary Torres reported J.R.'s allegations of abuse to Herb Brockman (Brockman). On July 24 or 25, 1996, Brockman placed Zabelveitia on administrative leave with pay pending the outcome an investigation into J.R.'s allegation of abuse. Mary Torres requested an examination of J.R. by a registered nurse at PRC on July 24, 1996, for physical injuries. No injury was found that was consistent with her allegation of being grabbed by the neck and thrown against the wall.

7. Mary Torres was directed to investigate the allegation. She did so and provided a written report to Brockman.

8. In the middle of August, 1996, J.R. was making allegations of abuse against other staff members. Charles DeVries was accused by J.R. of abuse. Subsequent to making the allegation of abuse against DeVries, J.R. retracted her allegation. J.R. explained that she made the false accusations against DeVries because she wanted to be moved out of the Maher House.

9. Following receipt of the investigative report, on September 4, 1996, Brockman held a R8-3-3 meeting with Zabelveitia. At this meeting, Zabelveitia denied verbally or physically abusing J.R. Brockman considered the information received during the R8-3-3 meeting and reviewed Zabelveitia's employment record. He determined that she was previously disciplined during her employment with PRC. Weighing heavily in Brockman's determination that Zabelveitia abused J.R. was the fact that J.R. consistently repeated the allegations of abuse in each of her encounters with the staff on and after July 24, 1996. Brockman also considered a statement given by another consumer who resided at Maher House on July 24, 1996, as corroboration of J.R.'s allegation of abuse.

10. Brockman does not tolerate abuse of consumers in the care of the state at PRC. He considers it to be a terminable offense. Therefore, by letter dated September 6, 1996 and September 16, 1996, Zabelveitia received notice of termination of her employment effective September 9, 1996. Zabelveitia was advised that she was found to have engaged in wilful misconduct in violation of State Personnel Board Rule, R8-3-3. Zabelveitia was also found to have violated PRC Policy 1.4.A2, which prohibits physical abuse of consumers at PRC.

DISCUSSION

Certified state employees have a protected property interest in their employment. The burden is on respondent in a disciplinary proceeding to prove by a preponderance of the evidence that the acts on which the discipline was based occurred and just cause exists for the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994); Section 24-4-105 (7), C.R.S. (1988 Repl. Vol. 10A). The board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously or in violation of rule or law. Section 24-50-103 (6), C.R.S. (1988 Repl. Vol. 10B).

The arbitrary and capricious exercise of discretion can arise in three ways: 1) by neglecting or refusing to procure evidence; 2) by failing to give candid consideration to the evidence; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. *Van de Vegt v. Board of Commissioners*, 55 P.2nd 703, 705 Colo. 1936).

This case rests in part on credibility determinations. When there is conflicting testimony, as here, the credibility of witnesses and the weight to be given their testimony is within the province of the administrative law judge. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987); *Barrett v. University of Colorado Health Science Center*, 851 P.2d 258 (Colo. App. 1993).

It is the role of the ALJ to weigh the evidence and from the evidence reach a conclusion. The "weight of the evidence" is the relative value assigned to the credible evidence offered by a party to support a particular position. The weight of the evidence is not quantifiable in an absolute sense and is not a question of mathematics, but rather depends on its effect in inducing a belief. The standard of proof that applies in this administrative proceeding is "by a preponderance." This standard of proof has been explained as follows:

> The preponderance standard requires that the prevailing factual conclusions must be based on the weight of the evidence. If the test could be quantified, the test would say that a factual conclusion must be supported by 51% of the evidence. A softer definition, however, seems more accurate; the preponderance test means the fact finder, both the presiding officer and any administrative appeal authority, must be convinced that the factual conclusion it chooses is more likely than not.

Koch, *Administrative Law and Practice*, Vol. I at 491 (1985).

Respondent contends that J.R. was a competent and credible witness and that her testimony that she was physically abused by complainant should be accepted as true. Respondent contends that it presented corroborating evidence from, Mary Torres, Lynn Coleman, and JoAnn Solis, which it is argued supports J.R. allegation that she was abused by complainant on July 24, 1996. Respondent further contends that because complainant was shown to have committed the acts for which discipline was imposed that the decision to terminate her employment should be found to be neither arbitrary, capricious, or contrary to rule or law.

Respondent contends that the developmentally disabled should not be automatically disqualified as credible witnesses in matters such as these merely by virtue of the fact that they reside at a state run facility for the developmentally disabled. Respondent encourages the ALJ to accept J.R.'s testimony as true. Respondent would further advance the notion that the testimony of its other witnesses should be viewed as corroborating evidence. Respondent's other witnesses testified: that they worked with J.R. on a one to one basis; that she is credible in her allegation of abuse; and her credibility is based on the fact that she has been consistent in her reports of the allegation, and her body language and demeanor suggest that she is telling the truth.

Complainant contends that respondent failed to sustain its burden to establish that complainant physically abused J.R. Complainant maintains that since this evidence was not established at hearing, it cannot be concluded that the termination of complainant's employment was warranted.

Complainant maintains that respondent's case rest in total on the testimony of J.R. Complainant contends that respondent failed to establish that J.R. is a competent or credible witness. Complainant maintains that respondent's refusal to produce J.R.'s medical record denied complainant due process since it precluded

her from obtaining evidence which would have reflected on J.R.'s competence and credibility.

The evidence presented at hearing failed to establish that J.R. was physically abused by complainant. Complainant called as witnesses to testify at hearing numerous credible individuals who are employed at PRC. These witnesses testified that J.R. was volatile, that she made false reports on staff members in order to get them in trouble, that PRC was required to repeatedly change the location of her residence in response to her complaints, and that she frequently made complaints about her living situation in order to prompt a move to a new residence. The evidence further established that a month after J.R.'s allegation of abuse was lodged, she made the same allegation of abuse against another staff member, Charles DeVries. The evidence was undisputed that soon after making the allegation against DeVries she retracted it.

When this case is viewed in its totality, the weight of the credible evidence requires the conclusion that complainant is not responsible for patient abuse nor did she engage in wilful misconduct. The evidence is insufficient to establish these matters as fact.

No evidence was presented that the parties are entitled to an award of attorney fees.

CONCLUSIONS OF LAW

1. Respondent failed to establish by preponderant evidence that complainant engaged in the acts for which discipline was imposed.

2. Respondent failed to establish that complainant violated PRC Policy or State Personnel Board rules.

3. The decision to terminate complainant's employment was arbitrary, capricious, and contrary to rule and law.

4. Neither party is entitled to an award of attorney fees.

ORDER

The action terminating complainant's employment shall be rescinded. Complainant shall be reinstated to the position held at the time of her termination. She shall be awarded full back pay and benefits from the date of termination to the date of reinstatement, less the appropriate offset required by law.

DATED this _____ day of April, 1997, at Denver, Colorado.

_____
Margot W. Jones
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the _____ day of April, 1997, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** In the United States mail, postage prepaid, addressed as follows:

Darol C. Biddle
323 South Union Avenue
Pueblo, CO 81003

Stacy Worthington
Office of the Attorney General
Department of Law
1525 Sherman St., 5th Floor
Denver, CO 80203

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NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar

days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.