Case No. 99 B 090

#### INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

Fidel Maestas,

Complainant,

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Department of Human Services, Pueblo Regional Center,

Respondent.

Hearing on this matter commenced on May 20, 1999 and evidentiary hearing was held on August 20 and August 25, 1999 before Administrative Law Judge G. Charles Robertson at the State Personnel Board Hearing Room, 1120 Lincoln Street, Suite 1420, Denver, CO 80203. The matter was deemed concluded and the record closed, as a result of post-hearing pleadings, on September 9, 1999.

## **MATTER APPEALED**

Complainant, Fidel Maestas ("Complainant" or "Maestas"), appeals the disciplinary termination imposed by Respondent, Pueblo Regional Center ("Respondent" or "PRC").

For the reasons set forth below, the actions of Respondent are UPHELD.

#### PRELIMINARY MATTERS

Respondent was represented by Stacy Worthington, Assistant Attorney General, 1525 Sherman Street, 5<sup>th</sup> Floor, Denver, CO. Complainant was represented by Ronald E. Gregson, 1775 Sherman Street, Suite 1775, Denver, CO 80203.

#### 1. Procedural History

The Notice of Appeal in this matter was received by the Board on February 22, 1999. On May 20, 1999, the evidentiary hearing was commenced. During the course of the hearing, the parties requested an opportunity to discuss settlement. Such an opportunity was provided and

after a short recess, the parties indicated they had reached a settlement. An order was issued from the bench vacating the hearing and mandating that the parties file a dispositive motion within 30 days of May 20, 1999.

The parties failed to reach settlement. Additionally, based upon a request from Complainant's counsel to withdraw from the matter, Complainant retained new counsel. The matter was re-set for August 20 and August 25, 1999.

Prior to the hearing, the parties filed the following motions:

- 1. Respondent's Motion to Enforce Settlement and for Sanctions:
- 2. Complainant's Response to Respondent's Motion;
- 3. Complainant's Motion to Continue Hearing and Conduct Additional Discovery;
- 4. Respondent's Response to Complainant's Motion; and
- 5. Respondent's Reply in Support of Its Motion to Enforce Settlement and for Sanctions.

The parties were subsequently ordered to appear on August 20, 1999 and to be prepared to (1) orally argue the outstanding pleadings; and (2) be prepared to go forward with the evidentiary hearing.

On August 20, 1999, oral argument was had on the outstanding pleadings. Additionally, Complainant testified as to his understanding of the initial settlement agreement and the reasons for not entering into a settlement agreement.

After oral argument, the administrative law judge denied Respondent's Motion to Enforce Settlement, in part, primarily because it was his previous ruling that the parties had 30 days to finalize the settlement from May 20, 1999 and that since no dispositive pleading was filed, it was contemplated by both parties that the settlement was not final. Additionally, it was noted that there was a dearth of evidence in the record to demonstrate what the parties had actually agreed to, and thus it was unclear as to how to enforce such a settlement.

However, the administrative law judge did award Respondent attorney fees and costs incurred as a result of Complainant failing to enter into a settlement in principle as proffered to the Board on May 20, 1999. Complainant's own testimony indicates that on May 20, 1999

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<sup>&</sup>lt;sup>1</sup> The award of attorney fees and costs is to include attorney fees and costs incurred in: (1) preparing Respondent's Motion to Enforce Settlement and For Sanctions; (2) preparing Respondent's Reply in Support of Respondent's Motion to Enforce Settlement, and (3) preparation for, and oral argument on, Respondent's Motion to Enforce Settlement.

Complainant was well aware the he was not going to enter into a settlement agreement despite his representation to the Board on May 20, 1999. Such represents bad faith in the settlement process.

Complainant's Motion to Continue Hearing and Conduct Additional Discovery was denied.

Parties submitted written closing arguments on September 8, 1999. Complainant's Closing Argument was mis-filed with the Division of Administrative Hearings but timely re-directed to the Board's office.

#### 2. Motion for Protective Order

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

#### 3. Witnesses

Respondent called the following witnesses in its case-in-chief: (1) Richard Durkin, DDT I, PRC; (2) Danelle Looney, Internal Investigator, PRC; (3) Theodore Gonzales, former DDT I, PRC; and (4) Valerie J. Slaughter, Director, PRC. On rebuttal, Respondent called Danelle Looney as a witness.

Complainant called the following witnesses in its case-in-chief: (1) Complainant; (2) Nancy McDonnell, RN, PRC; (3) Skip Stilson, DDTI, PRC; (4) Herb Brockman, Clinical Team Leader, Sierra Vista Center, CMHIP; (5) Thomas Deherrera, DDT I, PRC; and (6) Jerry Solano, Investigations, PRC.

#### 4. Exhibits

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

Respondent Exhibit	Description
1	Disciplinary Action
	2/9/99
2	Correspondence re: Suspension with Pay
	10/16/99
3	Notice of R8-3-3 Meeting
	10/16/99
4	Notice of Second/Follow-up R8-3-3 Meeting
	10/23/99 (confrontation with subordinates/workplace violence)
5	Notice of R8-3-3 Meeting
	1/4/99 (client abuse)

# The following exhibits were admitted in Respondent's case-in-chief:

Respondent Exhibit	Description	Comment
7	Transcript of R8-3-3 Meeting 10/26/99	
8	Transcript of R-6-10 Meeting 1/12/99	
9	Transcript of R-6-10 Meeting 2/2/99	
10	Investigation Witness Statement Form- Michael Kline 11/25/98	
11	Affidavit & Investigation Witness Statement Form- Theodore Gonzales	Limited for purposes of having been reviewed by Appt. Authority
12	Affidavit & Investigation Witness Statement Form-Darren Adame	(page 1 excluded)
13	Investigation Witness Statement Form- Ernie Maes	
14	Investigation Witness Statement Form- Dave Ortiz	
15	Affidavit & Investigation Witness Statement Form-Steve Espinoza	
17	Questions for Theodore Gonzales	
18	Questions for Steve Espinoza	
19	Questions for Darren Adame	
20	Questions for Ernie Maes	
21	Questions for Alfred Baca	
22	Investigation Witness Statement Form-Rick Durkin	
24	Transcript of Interview with G.R.	Admitted over objection
25	Memo/Report to V. Slaughter re: Investigation 1/30/99	-

# The following exhibits were admitted in Complainant's case-in-chief:

Complainant Exhibit	Description	Comment
2	Complainant PACE Evaluation 6/22/92	Commendable
3	Complainant PACE Evaluation 6/30/94 7/20/93	Commendable
4	Complainant PACE Evaluation 7/27/95	Commendable
5	Letter of Commendation from Jerry Solano, RN III to Complainant 9/29/96 First Aid Action for G.R.	Admitted over objection; need to remove name to comply with protective order

		Complainant referenced as highly skilled individual and insuring quality care
6	Letter of Commendation from Joan Solis to Complainant 10/22/96 Needs of G.R.	Admitted over objection; need to remove name to comply with protective order
		Complainant referenced appreciation of team effort for helping needs of G.R. in transportation
8	Complainant PACE Evaluation 7/16/97	Commendable
9	Complainant PACE Evaluation 6/26/96	Commendable
10	Complainant PACE Evaluation 6/8/98	Commendable
13	Employee of the Year 1997 Award For 887 Bellflower Home	Admitted over objection

#### <u>ISSUES</u>

- 1. Whether the acts for which discipline was imposed occurred;
- 2. Whether the discipline imposed was within the range of reasonable alternatives
- 3. Whether Complainant can overcome the presumption of administrative regularity;
- 4. Whether the appointing authority acted arbitrarily, capriciously, or contrary to rule or law;
- 5. Whether either party is entitled to an award of attorney fees pursuant to C.R.S. 24-50-125.5 (1998); and
- 6. Whether Respondent is entitled to offset an award to Complainant, or in the alternative, whether Complainant failed to mitigate damages.

#### FINDINGS OF FACT

# I. Respondent's Background

- 1. The Department of Human Services ("DHS") is the state agency responsible for providing direct care services to a variety of different populations, including developmentally disabled persons.
- 2. The Pueblo Regional Center is a division within DHS responsible for 12 group homes spread throughout the Pueblo community. Such homes are

residences for approximately 88 developmentally disabled clients. More often than not, the judicial system has determined that these individuals are wards of the state.

- 3. These clients, or residents, have been diagnosed with middle or moderate to profound mental retardation. The cognitive functions in individual residents can range from the equivalent of 1 –2 month olds to 8 10 year olds. Often the residents have accompanying physical impairments (blind, short stature, light weight, medical problems).
- 4. Staff at the PRC group homes includes Developmental Disabilities Technicians I and II ("DDT I" and "DDT II"). In order to be a qualified member of this class, an individual needs to have successfully passed a licensing test provided by the State Board of Nursing. DDTs' duties include providing hygiene care, the administration of various therapies, and general care for residents.
- 5. Because of the level of developmental disability of the residents, PRC staff are trained in methods for physically and safely restraining residents. Training includes techniques known as approved intervention techniques such as the "bear hug" and "basket hold." These techniques, as applied to residents, are designed to prevent self injury, prevent injury to others, and to not be painful.
- 6. In the event some type of physical intervention needed to occur by staff, the staff at PRC was required to use approved intervention techniques. Intervention methods not approved were not to be used.
- 7. One technique that was NOT approved for use by PRC staff was what is colloquially known as the "chicken wing" hold. This hold is described as having an individual's arms pinned behind the lower back, and then pressure being exerted upwards from the wrists towards the middle of the back, causing an individual's arms to bow out, mimicking chicken wings.
- 8. The homes are typically "ranch" style homes scattered throughout the community. The group homes, including one known as "887 Bellflower" provide medical services, therapeutic services, occupational services, and recreational therapy to its residents.
- 9. Generally, 887 Bellflower housed 4 clients and each of the clients had an individual bedroom.
- 10. 887 Bellflower was staffed 24 hours a day by employees being divided into 3 shifts. On Shifts 1 and 2, two employees would be on duty. On Shift 3 (late evening/early morning), one employee would be on duty. Employees held the classified position of at least a DDT I. The following

- employees worked at 887 Bellflower or with Complainant: Michael Kline, Theodore Gonzales, Darren Adame, Ernie Maes, Dave Ortiz, Steve Espinoza, Alfreda Baca, and Richard Durkin.
- 11. Since approximately, 1991, "G.R." was a client of PRC and resided a majority of the time at 887 Bellflower. G.R. was diagnosed, in part, as autistic and would frequently refer to himself in the 3<sup>rd</sup> person. As a client of PRC for the majority of his life, G.R. was subject to various techniques used to control residents' physical outbursts, including those *prior* to approved intervention techniques.
- 12. Nancy McDonnell, who provided care to G.R. as a registered nurse, never saw a *written* injury report with regard to G.R. and any improper restraints. However, McDonnell also was reliant upon the staff at 887 Bellflower to identify any issues that might arise regarding G.R.
- 13. Skip Stilson, Herb Brockman (a supervisor of Maestas), and Thomas DeHerrera *never* witnessed any use of improper holds on G.R.

## II. Complainant's Background

- 14. Complainant began working for DHS in October 1990. On May 26, 1991, Complainant was certified to the position of DDT I.
- 15. In 1991, Complainant was initially working at 887 Bellflower as a DDT I. At that time, 887 Bellflower was also staffed, in part, by David Ortiz, Stephen Espinoza, Darren Adame, Richard Durkin, William Lynch, and others.
- 16. During the course of his employment, Complainant received performance ratings of Commendable in 1992, 1993, 1994, 1995, 1996, 1997, and 1998. Herb Brockman was either the supervisor or reviewer in a majority of these performance ratings.
- 17. Complainant participated in the care of G.R. since the early 1990s. At that time, G.R. was often in his room by himself, had few if any clothes except underwear, and often needed to be restrained.
- 18. By 1998, G.R. had become less physically aggressive, had clothes, and was more social in that he was able to maintain employment in the community. He had fewer outbursts which lasted for shorter periods of time.
- 19. During the course of his employment, and especially in 1997 and 1998, Complainant did not "get along" with his co-workers at 887 Bellflower. Complainant admits that there was tension between himself and the other

employees. For example, at one point Maestas was asked if he was a "snitch." At another point, Maestas found broken broom handles which he thought were used by other employees on residents. (Maestas never reported his speculation with regard to the broom handles because he has just started working at PRC).

- 20. Another example of the tension involving Maestas is demonstrated by a confrontation which escalated between Durkin and Complainant as a result of a change in the work schedule. The confrontation escalated to such a point that a meeting had to be held with Herb Brockman, the supervisor, the following day. Witnesses corroborated Durkin's recitation of the story in that Maestas was yelling and shoving Durkin with his whole body.
- 21. In 1996, after having sought a promotion for a few years, Complainant was promoted to a DDT III position with supervisory responsibilities.
- 22. As a supervisor in 1997 and 1998, Complainant used derogatory names in referring to staff when the staff would question his decision-making such as "ass-hole", "fucking dumb white guy", and "stupid ass Mexican."
- 23. During his tenure as a state employee, Complainant received the award of Employee of the Year in 1997 at 887 Bellflower as determined by his peers.

# III. Performance of Employees and Events at 887 Bellflower Leading to Discipline

- 24. A number of employees at 887 Bellflower had performance problems. For example, Adame and Ortiz had been placed on administrative leave during 1996. During 1997 and 1998, Complainant supervised Theodore Gonzales at 887 Bellflower. At that time, Gonzales received a performance rating of Needs Improvement.
- 25. Gonzales was terminated in May 1998 for poor performance. Gonzales was rehired in early 1999. Then, he resigned as the result of rumors circulating to the PRC director about his medical history and mental health.
- 26. PRC conducted an investigation ("1st Investigation") of an allegation of client abuse against G.R. and M.I. in Fall 1998 raised by a former employee Mike Kline. It was alleged, in part, that Complainant had used the "chicken wing" hold on these two PRC residents. At that time, Jerry Solano was asked to investigate the allegations.

- 27. Contemporaneously, Mike Kline alleged discrimination by PRC in the course of his termination. DHS' Equal Employment Opportunity officer began an additional investigation on this claim ("EEO Investigation").
- 28. Valerie Slaughter, Director of PRC, conducted interviews with PRC staff as part of the EEO investigation. Her interviews included Theodore Gonzales, Steve Espinoza, Darren Adame, Ernie Maes, and Alfreda Baca. In so doing, allegations of discrimination arose in which it was claimed that Complainant engaged in intimidating and discriminatory conduct towards other staff at 887 Bellflower. Such alleged behavior included Complainant: (1) "belly bumping" other staff members in attempts to intimidate them; (2) challenging staff to fights; and (3) using derogatory remarks regarding ethnicity and religious affiliation.
- 29. As a result of the allegations associated with the 1<sup>st</sup> Investigation and the EEO investigation, Slaughter determined that a second investigation ("2<sup>nd</sup> Investigation") needed to be conducted with regard to Complainant.
- 30. The 2<sup>nd</sup> Investigation was conducted by Danelle Looney. Looney was a "back-up" investigator responsible for this investigation as a result of PRC's primary investigator being unavailable. At the time, the 1<sup>st</sup> Investigation by Solano was not complete.
- 31. Looney is a registered dietician for PRC and acts as "back-up" investigator. Looney's formal education is related to food and nutrition and working with developmentally disabled individuals. Additionally, Looney has received on the job training for conducting investigations. She also completed three weeks of specific training in conducting investigations.
- 32. As part of the 2<sup>nd</sup> Investigation, Looney did the following:
  - ◆ Had photographs taken of G.R. for evidence of injury and had a medical assessment done of G.R.;
  - ◆ Notified Adult Protection Services and informed G.R.'s legal guardians of the investigation;
  - ◆ Contacted the Pueblo County Sheriff's Department regarding allegation of client abuse;
  - ♦ Interviewed G.R.;
  - ◆ Interviewed M.I. (another resident of 887 Bellflower);
  - ♦ Interviewed 30 individuals including former staff and residents; and
  - ♦ Accumulated 37 pieces of documentary evidence which included, in part, written statements of PRC employees, transcribed statements of G.R., written statements of Complainant; Resident treatment plans and medical reports of G.R., and PRC written policies re: patient abuse, workplace violence, and safety control procedures.

- 33. At some point in time after the 2<sup>nd</sup> Investigation was commenced, Solano produced the 1<sup>st</sup> Investigation Report. Solano concluded that Kline's allegations were the result of Kline being a disgruntled former employee. Slaughter determined that the 1<sup>st</sup> Investigation was incomplete and that not enough interviews had been conducted.
- 34. The Pueblo County Sheriff's Department determined there was lack of probable cause of client abuse to proceed with the matter after commencing its own investigation. Such a conclusion was based on a lack of physical evidence of abuse.
- 35. The photographs of G.R. failed to produce any indication of abuse.
- 36. During the course of the interview of G.R., G.R. indicated that he had experienced painful holds during the course of his residency. He did not specifically identify Complainant as having used any painful holds or the chicken wing hold.
- 37. During the course of the interview of M.I., M.I. indicated he had also experienced painful holds during the course of his residency. Again, Complainant was not specifically identified by M.I. as having perpetrated any client abuse or improper physical holds. M.I. did indicate that the painful holds were by a man that worked at 887 Bellflower.
- 38. The interviews with staff determined the following:
  - ◆ Complainant assaulted Michael Kline when certain paperwork was not timely completed;
  - ◆ Complainant used a "chicken wing" hold on G.R. as observed by Michael Kline, Theodore Gonzales, Darren Adame, Dave Ortiz and Richard Durkin; and
  - ♦ Complainant would attempt to intimidate staff by use of derogatory language, threatening of discipline, and physically assaulting staff as witnessed by Theodore Gonzales, Darren Adame, Ernie Maes, and Steve Espinoza.
- 39. One individual, Rodney Shields, refused to make a statement during the investigation for fear of retaliation.
- 40. Each of the staff who provided statements had received training on approved intervention techniques. Despite incidents occurring over a number of years, none of the incidents cited by the witnesses was timely reported to PRC by staff.

- 41. Gonzales was afraid to report any incidents because of threats of physical assault by Complainant and fear of losing his job. On one occasion, Complainant and Gonzales had an altercation in which Gonzales' mother was referenced. At that time, Maestas "belly bumped" Gonzales in an effort to intimidate him.
- 42. Looney did determine that Gonzales was "disgruntled" with Complainant based on his previous performance ratings.
- 43. Complainant was the last person interviewed by Looney. He did not volunteer any information at that time and indicated he was not familiar with what a "chicken wing" hold looks like.
- 44. Looney's Report was completed January 30, 1999.
- 45. On October 16, 1998, Valerie Slaughter, the appointing authority, based upon the Investigation #1 and the EEO Investigation, suspended Complainant with pay and noticed an R8-3-3 meeting with Complainant based on allegations of patient abuse, confrontations with subordinates which may be construed as violence in the workplace, and alleged discriminatory behavior.
- 46. On October 26, 1998, an R-8-3-3 meeting was held which focused on confrontations with subordinates and discriminatory behavior.
- 47. On January 12, 1999, another disciplinary meeting was held under Rule R-6-10 with regard to allegations of resident abuse.
- 48. On January 20, 1999, Slaughter requested additional information from Complainant be submitted within one week and noticed an additional R-6-10 meeting for February 2, 1999. Again, a disciplinary meeting was held.
- 49. On February 9, 1999, Complainant was disciplined in the form of termination, pursuant to Board Rule R-6-9, for:
  - (1) willful misconduct or violation of agency rules or law that affect the ability to perform the job, including:
    - violation of PRC Policy; 1.4.A2, abuse, mistreatment, neglect and exploitation of residents;
    - ♦ violation of PRC Policy 1.5.W1(a): workplace violence; and
    - ◆ violation of PRC Policy 1.5.W1(b): workplace violence and exposure control program.
  - (2) violation of Board Rule R-9-3: Discrimination; and

(3) violation of PRC Policy 4.1.A1: Affirmative Action (EEO/ADA Compliance).

#### **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 R-6-9, 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.

- A. Whether Complainant committed the acts for which discipline was imposed.
  - 1. Acts of Patient Abuse: PRC Policy 1.4.A2; Board Rule R-6-9

By far, the issue of patient/resident abuse is the most troubling in this matter. A number of witnesses, some of which are no longer employed by PRC, claim that Complainant utilized improper intervention techniques over a number of years at PRC, especially with one resident G.R. As the result of another investigation, this matter came to the appointing authority's attention. Thereafter, an extensive investigation was conducted over a number of months involving interviews, review of patient and employee records at 887 Bellflower, police involvement, physical examinations, etc. A thorough analysis was conducted and it was determined that Complainant did use improper holds on at least one resident at 887 Bellflower.

Complainant maintains that each of Respondent's witnesses' statements are bias, and that some level of "conspiracy" so as to cause such collaboration in statements must exist. Complainant suggests that he lives a "clean" lifestyle, that Respondent's witnesses do not live such a lifestyle because they may smoke marijuana, and that for this reason, the witnesses have collaborated.

However, no evidence besides Complainant's testimony supports Complainant's theory of the case. The record does not in anyway support Complainant's theory. The written evidence and oral testimony is consistent to the extent it identifies Complainant's use of an improper hold or restraint. Each of the witnesses had opportunities during the tenure of their employment to Respondent's witnesses lack any motive for observe Maestas' behavior. No evidence demonstrates that any of the witnesses' fabrication of facts. testimony or statements should be disregarded because of illicit drug abuse. Moreover, while Complainant suggests that Respondent's witnesses, during the course of the investigation and during the hearing, collaborated in providing information, Maestas fails to proffer any reason why such a collaboration would exist. It is unclear as to why such a collaboration would exist amongst so many individuals. This is reinforced by the fact that a number of the witnesses are no longer employed by PRC, thereby having little or no "stake" in collaborating Complainant's testimony in this regard is statements or testimony. unreasonable to the point of lacking credibility. Further, Complainant's witnesses, while consistently stating that they never observed Maestas engage in any client abuse, did not have the same opportunity to observe Maestas consistently at 887 Bellflower.

It is of concern that no incidents of patient abuse involving Complainant were ever reported. At first glance, this would seem to support Complainant's position that PRC's case is based on fabrication. However, Complainant was a supervisor during a portion of the relevant time period, and it is reasonable, given the small work environment, that witnesses to abuse could have been intimidated. A number of witnesses testified that they were "reluctant" to file any incident reports because of fear of retaliation from Complainant.

Respondent clearly shows by a preponderance of evidence that Complainant engaged in the conduct for which discipline was imposed, vis-a-vis the use of improper hold techniques.

2. Acts of Discrimination: PRC Policy 4.1.A1; Board Rule R-9-3; Board Rule R-6-9.

Little evidence was provided on this issue with the exception of references to a few derogatory or racial remarks made in written statements of former employees made during the course of the investigations. Complainant denies making any such remarks.

PRC Policy 4.1.A1 and Board Rule R-9-3 prohibit discrimination in the workplace such that it impacts personnel actions. In this instance, and given the evidence introduced, Respondent fails to demonstrate that PRC Policy or Board Rule was violated. Insufficient evidence was proffered to demonstrate that Complainant engaged in discriminatory employment actions with regard to specific employees or that Complainant's alleged comments created such a hostile work environment as to foster discrimination.

3. Acts of Workplace Violence: PRC Policy 1.5.W1(a)(b); Board Rule R-6-9.

The facts clearly demonstrate that Complainant was physically aggressive with other PRC staff at 887 Bellflower. Various witnesses established that Complainant would challenge employees to "step outside" to fight and resolve differences. Moreover, individual witnesses confirmed that on more than one occasion, Complainant would bump into other employees, during altercations, as if to provoke additional violence. This type of behavior is in violation of PRC's policy on workplace violence in that it is an act or direct threat of physical aggression. Such behavior cannot be condoned in state government no matter what the circumstances. Respondent has met its burden in demonstrating that Complainant committed such behavior.

B. Whether the discipline imposed was within the range of reasonable alternatives available to the appointing authority.

Board Rule R-6-2, 4 CCR 801 (1998) provides:

A certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. The nature and severity of discipline depends upon the act committed.

As determined by the appointing authority, the actions of Complainant posed a serious threat to the residents of PRC as well as the staff. Complainant's actions inflicted harm upon at least on PRC resident, G.R. Moreover, the actions were in direct conflict with the approved intervention techniques of PRC and PRC's policies with regard to treatment of residents. Additionally, Complainant's aggressive behavior, in that he would consistently challenge employees to fight, and assault employees in order to provoke an escalation of disputes, demonstrates flagrant violations of PRC's workplace violence policies.

What is troubling is given that employees failed to timely report the incidents with G.R., and the workplace violence incidents, Complainant was never given an opportunity to improve or correct his behavior. Had such reporting occurred, an opportunity may have existed to "correct" the behavior through progressive discipline. But because of the failure to report such incidents, Complainant's performance evaluations consistently rated him as commendable. Nevertheless, PRC's failure to identify the policy violations cannot excuse Complainant's conduct. PRC is charged with protecting developmentally disabled individuals. To allow Complainant to continue at PRC would be a disservice to PRC's residents. Complainant's actions are serious and flagrant so as to warrant discipline in the form of termination.

C. Whether the Complainant can overcome the presumption of administrative regularity.

The presumption of administrative regularity is not applicable in this instance in that to apply such a presumption would be to negate Respondent's burden of proof (production and going forward) by improperly shifting that burden to Complainant.

D. Whether the appointing authority acted arbitrarily, capriciously, or contrary to rule or law.

A review of the record indicates that Respondent did not act arbitrarily, capriciously, or contrary to rule or law. See: Department of Institutions, Div. For Developmental Disabilities, Wheat Ridge Regional Center v. Kinchen, 886 P.2d 700 (Colo. 1994). The agency clearly conducted an extensive investigation as cited above. It further provided Complainant with extensive opportunities, via numerous pre-disciplinary meetings, to present mitigating circumstances or valid explanations for the behaviors. The appointing authority went so far as to allow

Complainant additional time to provide documentary evidence to support his claims. None was produced.

Respondent met its burden and demonstrated that its actions were not in violation of rule or law or otherwise arbitrary or capricious.

E. Whether either party is entitled to an award of attorney fees and costs pursuant to C.R.S. 24-50-125.5 (1999).

With regard to the issue of attorney fees, Board Rule R-8-38, 4 CCR 801 (1999) 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. First, no evidence was introduced to demonstrate this personnel action was commenced in bad faith or maliciously. Second, the rule provides that in order for a party to be assessed attorney fees and costs, the personnel action may be found to have been instituted *frivolously*. Frivolous cases are defined to include actions or defenses in which it is found that no rational argument based on the evidence or the law is presented. Complainant did provide a rational argument, the retaliation of disgruntled employees, as a theory of the case, albeit unsuccessful. And, Complainant provided evidence at hearing, by way of witness testimony that attempted to support his position, it cannot be stated that the personnel action, his appeal, was instituted frivolously.

The rule and statute also allow, in part, for the award of attorney fees and costs in the event the personnel action is found to have been groundless. The rule provides that a personnel action is groundless if despite having a valid legal theory, a party fails to offer or produce ANY competent evidence to support such an action. In this case, Complainant called six witnesses and presented documentary evidence as to his performance history. All such evidence is competent in that it relates to Complainant's position with regard to his past performance, and the need for progressive discipline. The testimony solicited did produce some competent evidence for the record. As a result, attorney fees and costs are not to be awarded vis-a-vis the merits of the case.

F. Whether Respondent is entitled to offset an award to Complainant, or in the alternative, whether Complainant failed to mitigate damages.

Given the findings above, this issue is rendered moot.

## **CONCLUSIONS OF LAW**

- 1. The acts for which discipline was imposed occurred as follows:
  - a. Complainant engaged in acts of workplace violence in violation of PRC Policy 1.5.W1(a) and (b) and Board Rule R-6-9, 4 CCR 801 (1998); and
  - b. Complainant engaged in acts of patient abuse in violation of PRC Policy 1.4.A2 and Board rule R-6-9.
  - c. Complainant DID NOT engage in acts constituting a violation of Board Rule R-9-3, 4 CCR 801 (1998) or PRC Policy 4.1.A1.
- 2. The discipline imposed was within the range of reasonable alternatives of the appointing authority given the serious and flagrant nature of the acts.
- 3. The presumption of administrative regularity is not applicable so as to shift Respondent's burden of production or burden of going forward in presenting evidence.
- 4. The appointing authority did not act arbitrarily, capriciously, or contrary to rule or law.
- 5. Neither party is entitled to an award of attorney fees pursuant to C.R.S. 24-50-125.5 (1998), except as noted in Preliminary Matters, Section 1-Procedural History.
- The issue of whether Respondent is entitled to offset an award to Complainant, or in the alternative, whether Complainant failed to mitigate damages is moot.

#### **ORDER**

Respondent's actions and the disciplinary termination of Complainant are uphelo			
Dated this 25 <sup>th</sup>	G. Charles Robertson		
Day of October 1999	Administrative Law Judge		