STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 94B019

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOSEPH CARLOS LUCERO,

Complainant,

vs.

DEPARTMENT OF INSTITUTIONS,
DIVISION OF DEVELOPMENTAL DISABILITIES,
WHEAT RIDGE REGIONAL CENTER,

Respondent.

Hearing was held on November 4, 1994 and January 5, March 9, 10 and 16, 1995 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Toni Jo Gray, Assistant Attorney General. Complainant appeared and was represented by Dennis H. Gunther, Attorney at Law.

Complainant testified as his sole witness. Respondent's witnesses were: Shaun Brooks, Food Service Utility Worker; Debra Azuero, Staffing Office Coordinator; Gina Fanelli-Valdez, Quality Assurance Investigator; Paula Navarro, Residential Director; Brett Clark, Staff Development Trainer; David Colagrosso, Director of Staffing Office; Rebecca Miller, Residential Coordinator; and Carl Schutter, Human Resources Coordinator, Wheat Ridge Regional Center.

Respondent's Exhibits 1 through 18 were stipulated into evidence.

Complainant's Exhibit A was admitted without objection and Exhibit B was admitted over objection.

MATTER APPEALED

Complainant appeals the disciplinary termination of his employment for unsatisfactory job performance while a probationary employee.

ISSUES

1. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;

2. Whether Complainant failed to mitigate his damages;

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

PRELIMINARY MATTERS

Complainant filed an appeal of the termination of his employment on August 4, 1993, indicating that he was a temporary employee. The appeal was dismissed for lack of jurisdiction. Complainant filed a motion for reconsideration of the dismissal order, asserting that he was a permanent employee at the time of termination. The matter of employment status was heard by Administrative Law Judge Margot Jones, who, by written decision dated January 25, 1994, concluded as a matter of law that Complainant was a permanent probationary employee who was terminated from employment for poor job performance on July 22, 1993, and that he was entitled to petition the State Personnel

Board for a hearing. Complainant's original petition was reinstated. The Board granted Complainant's petition on September 20, 1994.

FINDINGS OF FACT

1. Complainant, Joseph Carlos Lucero, received formal training as a temporary employee with Wheat Ridge Regional Center (Ridge) from March 8 through June 11, 1993 to become a licensed psychiatric technician (LPT). He was awarded a certificate of completion. The curriculum included training in the Colorado Approved Intervention Techniques (CAIT), which are intervention techniques to be implemented when a client becomes physically abusive to himself or others. Basically, the "least intrusive method" is to be used in any given situation.

2. Complainant began working for Ridge as an LPT on July 1, 1993. However, unlike other recent graduates of the training program, Complainant was not formally transferred from the status of a temporary employee to that of a permanent employee because he had expressed a desire to work at the Pueblo Regional Center, and the agency anticipated that Complainant would soon transfer to Pueblo.

3. The clients served by Ridge are developmentally disabled individuals who reside in group homes supervised and managed by Respondent. On the morning of July 9, 1993, Complainant was assigned to work with LPT II Rebecca Miller in delivering food items to the homes with the use of a van. Miller had worked at Ridge for ten years and acted in the capacity of Complainant's supervisor on that day. Five clients were assigned to this "food crew" and assisted in loading and unloading the food items. One of the clients was L.L.

4. Client L.L. has a mental functional level of two years, seven months. He refers to other members of the food crew by name, but he uses "Boy" or "My Boy" to refer to males with whom he is unfamiliar, as he was with Complainant. L.L. does not normally exhibit aggressive behavior toward staff but is known to "pat" or "pinch" employees on the buttocks, apparently in an effort to gain attention. Miller, who had known L.L. for several years, did not advise Complainant of this type of behavior, which staff members generally accepted and did not consider threatening. Complainant had never worked with L.L. before July 9, 1993.

5. At around 10:30 a.m. on July 9, Complainant was supervising four clients near the van, which was being loaded with food items in preparation for the second delivery of the day. Miller was inside filling food carriers when she stepped onto the loading dock and witnessed L.L. "pat or pinch" Complainant on the buttocks. Complainant, who was leaning into the van, turned around and slapped L.L. on the top of the head with an open hand. The van was parked directly against the loading dock, about ten feet from the kitchen door from which Miller emerged.

6. Complainant testified to the following account of the July 9 incident: L.L. twice "grabbed" him on the buttocks from behind and walked away laughing. Complainant found this behavior offensive, describing it as a squeeze, "like a goose". Complainant reported the incidents to Miller, who responded to the effect that L.L. does that, that he grabs people. She did not give any directives to L.L. About 20 minutes later, at the van, L.L. again grabbed Complainant from behind, this time in the groin area. Complainant turned around awkwardly, took hold of L.L.'s left wrist and sternly said, "Don't do that." Then he stepped away and heard Miller say, "You don't hit these clients." Miller

repeated the statement. Complainant denies hitting L.L.

7. Miller approached Complainant and told him that, "You don't hit these clients." Complainant responded that it was a normal reaction and he didn't mean to do it. Miller then went back inside the building, to the kitchen, and sent Shaun Brooks, a dietary worker, outside to watch the clients while she made a phone call.

8. Miller telephoned Debra Azuero, the staffing office coordinator, and said that she wanted Lucero out of there because he had hit a client. Azuero said to send him to her office, and she would take care of it. Miller returned to the area of the van and told Complainant to report to the staffing office. Complainant, who was visibly upset, stated words to the effect that he had a wife and four kids, he needed the job, and what was she doing. He then went to the staffing office, as instructed.

9. At the staffing office, Complainant said to Azuero that he was worried that this might affect his application for a job at the Pueblo Regional Center, he had a family and needed a job, it was an accident, and he acted instinctively like he does with his kids. Azuero verbally placed Complainant on administrative suspension with pay pending an investigation. Complainant remained on the premises to be interviewed.

10. Following the call from Rebecca Miller, but prior to the arrival of Complainant, Debra Azuero called someone in the quality assurance department to report the incident. Someone in that office contacted the Arvada Police Department.

11. Miller called her direct supervisor, Paula Navarro, to apprise her of the incident and to arrange for staff coverage.

Miller told Navarro that Complainant had asked her to not report the incident and that she "would not hear the end of it" if she did.

12. Quality Assurance Investigator Gina Fanelli-Valdez interviewed client L.L. in the presence of Arvada Police Officer Sasser and Paula Navarro. L.L. identified Complainant as "Boy" and started slapping himself on top of the head with his open hand. L.L. seemed agitated and upset. When asked directly if Lucero had hit him, he shook his head "yes".

13. Later that day, when being examined by a physician, L.L. stated that "My Boy" hit him on the face. In response to the physician's inquiry as to where on the face, L.L. pointed to the top of his head. L.L. did not sustain any physical injuries. There were no marks on his head. (Respondent's Exhibit 10.)

14. After interviewing L.L., Fanelli-Valdez and Officer Sasser continued the investigation by talking to Rebecca Miller and Complainant. Officer Sasser issued Complainant a municipal summons for battery. (Respondent's Exhibit 11, officer's report.)

15. By written report dated July 13, 1993, Fanelli-Valdez concluded that Joseph Carlos Lucero had slapped L.L. on the head. She recommended that "personnel action" be taken. (Respondent's Exhibit 12.)

16. By memo dated July 16, 1993, Debra Azuero asked Carl Schutter, Support Services Director and delegated appointing authority for disciplinary actions, to schedule a Rule R8-3-3 meeting with Complainant "for alleged client abuse". (Complainant's Exhibit A.) It was her belief that Complainant was a temporary employee. She thought that temporary as well as

permanent employees were entitled to a predisciplinary meeting. Attached to the memo was a copy of Miller's written statement (Respondent's Exhibit 9). Azuero does not recall if the police report or the physician's notes were also attached.

17. David Colagrosso is the Staff Development Director at Ridge. Colagrosso first learned of the incident from Debra Azuero on the day that it happened. After reviewing the Fanelli-Valdez report, which included copies of the police report, Miller's statement and the physician's notes, he verbally recommended to Carl Schutter that Complainant be terminated because of client abuse and violation of the approved intervention techniques (CAIT), which require the technician to use the least intrusive method of handling physical behavior by a client. His recommendation was based upon his perception of the seriousness of the incident and the conduct which Complainant displayed. Colagrosso considered Lucero to be a temporary employee.

18. Upon receipt of Debra Azuero's July 16 memo requesting an R8-3-3 meeting for Complainant, Carl Schutter reviewed Complainant's personnel file and concluded that his employment status was temporary. Because of the recency of Complainant's employment, there was very little in his file for Schutter to review. Schutter reviewed the investigative report of Fanelli-Valdez as well as the police report, Miller's written statement and the physician's notes. (See Respondent's Exhibits 9, 10, 11 and 12.) Schutter discussed the matter with Colagrosso and accepted Colagrosso's recommendation that Complainant be terminated for violating the policy against client abuse. The standard practice of the agency is to terminate any employee who abuses a client.

19. Schutter placed Azuero's memo in Complainant's personnel file with the following handwritten note: "A review of this employee's

file reveals that Mr. Lucero is a temp. appointment. 8-3-3 meeting unnecessary. Decision: terminate temp. appointment effective 7-22-93." Schutter did not return the memo to Azuero or forward it to anyone else; his purpose was only to document the file.

20. By letter dated July 22, 1993, Schutter informed Complainant that, "At the request of David Colagrosso your temporary appointment with the Wheat Ridge Regional Center has been terminated effective today." (Respondent's Exhibit 6.)

21. Since January 1994, Complainant has been employed as a home health aide for a hospital in Pueblo.

DISCUSSION

Because a probationary employee has not yet acquired a property interest in state employment, Complainant bears the burden to prove by preponderant evidence that Respondent's action was arbitrary, capricious or contrary to rule or law. Cf. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The credibility of the 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). If the evidence presented weighs evenly on both sides, the finder of fact must resolve the question against the party having the burden of proof. People v. Taylor, 618 P.2d 1127 (Colo. 1980).

It is Respondent's contention that Complainant was dismissed for unsatisfactory job performance, i.e, abusing a client by striking the client on the head, and that, as a probationary employee who was terminated for unsatisfactory performance, Complainant is not entitled to the full range of due process rights afforded

certified state employees. The burden is on Complainant to show that his job performance was not unsatisfactory, i.e., that he did not slap L.L., thus rendering Respondent's action in terminating him for that reason arbitrary and capricious.

It is the role of the administrative law judge 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.

"Standard of proof" refers to the amount of evidence necessary for a party to prevail on a given issue. The highest standard of proof is "beyond a reasonable doubt", which is the standard applied to the prosecution in a criminal case in order to obtain a conviction.

A "clear and convincing" standard is somewhat lower than beyond a reasonable doubt. This standard is applied in such cases as, among others, those involving the termination of parental rights and in deportation hearings.

The lowest of the three standards of proof, that which applies in this administrative setting, is "by a preponderance" and 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 that 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. [Emphasis supplied.]

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

The evidence establishes that it is more likely than not that Complainant slapped L.L. on the top of the head. The combined testimonies of Rebecca Miller, Debra Azuero, Paula Navarro and Gina Fanelli-Valdez, together with the statements and actions attributed to L.L., support this conclusion. Complainant's outright denial and explanation of events, inclusive of implied allegations that Rebecca Miller possessed ulterior motives, are uncorroborated, incredible and successfully refuted by Respondent. It is found that Complainant's act of slapping L.L. violated the approved intervention techniques and constitutes client abuse, which translates to unsatisfactory job performance by a probationary employee. The term "unsatisfactory performance" includes failure to comply with standards of efficient service or competence, and willful misconduct on the job. Rule R10-5-1(B)(1), 4 Code Colo. Reg. 801-1. Even if Complainant was unfamiliar with L.L.'s acknowledged behavior, which he seems to proffer as a mitigating factor on the one hand but on the other testified that Rebecca Miller informed him of L.L.'s habitual "grabbing" after the alleged second occurrence, this does not mitigate Complainant's conduct. This was not an act of self-defense; it was an act of aggression which Complainant immediately regretted. The proper CAIT procedure would have been for Complainant to instruct the client to not do that and to move away, which is essentially how Complainant testified. The appointing authority's unrefuted testimony was that client abuse is the "capital offense" in this field and termination is the standard discipline imposed by the agency for the offense.

Complainant alleges several procedural errors on the part of Respondent and argues that these procedural errors should result

in the action being overturned. In point, Complainant asserts that he was not given verbal or written notice of the reasons for his termination; the termination letter, which was not sent by certified mail, simply terminated the perceived temporary appointment and did not reference unsatisfactory job performance; there was no communication with Complainant as to acceptable standards of conduct; he was never told of the charges against him and had no opportunity to respond thereto, and he was administratively suspended without the required writing.

Complainant asserts that he should have been issued a corrective action instead of being immediately dismissed. Probationary employees do not have the right to be granted a period of time in which to improve their performance. Procedure P6-1-1(C)(4), 4 Code Colo. Reg. 801-2. The concept of "progressive discipline" applies to certified, not probationary state employees. R8-3-1(C), 4 Code Colo. Reg. 801-1. A probationary employee who is dismissed for unsatisfactory performance is not entitled to a predisciplinary, information exchange meeting. R8-3-3(D)(1), 4 Code Colo. Reg. 801-1. Even so, Complainant was interviewed during the investigation and the appointing authority reviewed the investigative report.

Complainant argues that he was denied the right to a performance planning appraisal and therefore did not have notice of the acceptable standards of conduct. There was no rule violation here. A performance plan must be established for a new employee within thirty days after being hired. While the agency expected Complainant to transfer to the Pueblo Regional Center and did not intend to establish a performance plan for him in view of the perception that he was still a temporary employee and temporary employees are not entitled to a performance plan, there was still time to do so and comply with the rule, given that the incident

occurred within 30 days of the date Complainant should have been converted to permanent status. Procedure P8-2-3(B), 4 Code Colo. Reg. 801-2. Additionally, after having received training in his field, inclusive of the approved intervention techniques and a clinical experience, Complainant was aware of the conduct expected of his position and did not need to be told that it was wrong to slap a client. This is not a case of an employee performing unsatisfactorily because his job duties and standards of acceptable conduct were not explained to him. Complainant does not submit that he did not know that slapping a client was unacceptable behavior, but rather proffers that he used the proper CAIT procedures with which he was admittedly familiar. The absence of a written performance plan thus had no bearing on Complainant's conduct of July 9, 1993.

Complainant was administratively suspended on July 9, 1993 without written notice by the appointing authority of the reasons therefor in violation of Rule R8-3-4(C)(1), 4 Code Colo. Reg. 801-1. The appointing authority also violated Rule R8-3-3(D)(4), 4 Code Colo. Reg. 801-1, which contains its own remedy and provides in pertinent part:

> (4) Notice of disciplinary action. If disciplinary action is taken, the appointing authority shall inform the employee, within 5 working days following the effective date of the action. The appointing authority may notify the employee at his last known address by certified letter, return receipt requested or personally deliver and have the employee sign that s/he received such notice. The notice shall state the action taken, describe specific charges giving rise to the action, and inform the employee of his rights to appeal the action to the board within 10 days of receipt of the notice.
>
> (a) If the appointing authority fails to follow the procedure outlined in this section, the employee shall be compensated in full for the 5-day period and until proper notification is received.

Complainant was not at any time formally advised of specific charges or of his right to appeal the appointing authority's decision. Ultimately, he did appeal and was afforded a full evidentiary hearing before a neutral third party. The notice of appeal dated July 31 and received in the Board office on August 4, 1993, referenced the July 9 incident as possibly the "real reason" for the termination, but Complainant primarily addressed the failure of the agency to convert him to permanent status, in that the termination letter merely informed him that his temporary appointment was terminated.

The significance of the requirement of a certified mailing or personal delivery, in addition to assuring receipt by the employee, is that it verifies the date of receipt of the notice from which the ten-day jurisdictional period for filing an appeal can be calculated. In the present matter, the right of appeal was, in fact, exercised and a hearing was held. If Complainant had not exercised his right of appeal for lack of advisement thereof, the cure would have been to suspend the ten-day filing requirement pending the filing of an appeal or until Complainant received the required advisement.

The written notice requirement of R8-3-4(C)(1) is directory. Cf. Shaball v. State Compensation Insurance Authority, 799 P.2d 399 (Colo. App. 1990). R8-3-3(D)(4)(a) mandates that the employee be fully compensated until proper notification is received. The question becomes, when did Complainant receive "proper notification" of the "specific charges"?

Upon Complainant's motion for reconsideration of the dismissal of his original appeal for lack of jurisdiction, a hearing was held on the issue of Complainant's employment status and, on January

25, 1994, Judge Jones ruled that, as a matter of law, Complainant was a probationary employee who was terminated for unsatisfactory performance based upon the alleged incident of client abuse on July 9, 1993. Complainant's appeal was reinstated on the date of Judge Jones' order, and the matter was set for preliminary review, in accord with the rights of probationary employees. Section 24-50-125(5), C.R.S. (1988 Repl. Vol. 10B.) Complainant therefore received "proper notification" on January 25, 1994, notwithstanding Complainant's continuing assertion that he was dismissed because he was thought to be a temporary employee and not for poor job performance. The subsequently filed information sheets and prehearing statements plainly address the issue of client abuse such that there could be no reasonable misunderstanding by Complainant. Upon the clarification of his employment status and reason for termination, together with the reinstatement of the previously dismissed appeal, Complainant was properly notified of the charges against him and of his right to appeal.

Respondent made a mistake of law in treating Complainant as a temporary rather than permanent probationary employee. This error of law resulted in certain procedural defects in the proceeding, as discussed above, but not to the extent depicted by Complainant. Neither the personnel action from which this proceeding arose nor the defense thereof was instituted frivolously, in bad faith, maliciously or was otherwise groundless. See section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B). The appointing authority did not abuse his discretion in terminating Complainant's employment with the agency for unsatisfactory job performance based upon client abuse.

CONCLUSIONS OF LAW

1. Respondent's action was arbitrary, capricious or contrary to rule or law to the extent that modification, but not reversal, is required.

2. Complainant did not fail to mitigate his damages.

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

ORDER

Respondent shall compensate Complainant in full for the period July 22, 1993 through and including January 25, 1994, with an offset for any substitute earnings or unemployment compensation benefits. Respondent's action is affirmed as modified. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of April, 1995, at Denver, Colorado.

_____
Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the _____ day of April, 1995, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Dennis H. Gunther
Attorney at Law
4800 Wadsworth Blvd. #118
Wheat Ridge, CO 80033

and in the interagency mail, addressed as follows:

Toni Jo Gray
Assistant Attorney General
Department of Law
Human Resources Section, 5th Floor
Denver, CO 80203

_____

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 and advance the cost therefor. 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 - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is $50.00. The estimated cost to prepare the record on appeal in this case with a transcript is $2,016.50. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment 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. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.

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 Code of Colo. Reg. 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 Code of Colo. Reg. 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 Code of Colo. Reg. 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.