

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 97B025

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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-- RAY WILLIAM LYNCH,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,  
PUEBLO REGIONAL CENTER,

Respondent.

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Hearing was held on November 13 and 14 in Pueblo, Colorado before Administrative Law Judge Robert W. Thompson, Jr. Respondent appeared through Herb Brockman and was represented by Toni Jo Gray, Assistant Attorney General. Complainant appeared and was represented by Carol Iten, Attorney at Law.

Respondent's witnesses were: Donna Leal, Developmental Disabilities Aide; Gerald Avery, Case Manager, Pueblo County Board for People with Developmental Disabilities; Shannon Green, Adult Protective Services Worker, Pueblo County Department of Social Services; Billie Young; Ray Encinas; Joan Solis, Director of Case Management, Pueblo Regional Center; Mary Diane Torres, Internal Investigator; and Herb Brockman, Residential Services Director, Pueblo Regional Center.

Complainant testified on his own behalf and also called: Sheila Sullivan, Licensed Practical Nurse; Rose Marie Arguella, Developmental Disabilities Technician IB; Toni Van Zandt, Nurse Specialist IV; and Jim Marrow, Developmental Disabilities Technician I. Marrow's testimony was stipulated into evidence. He did not appear in person.

Respondent's Exhibits 1 and 2 were admitted into evidence by stipulation of the parties. Exhibits 4, 5(p. 4), 6, 7, 8, 9, 10, 12, 14 and 18 were admitted without objection. Exhibits 3, 5(p. 3), 15 and 16 were admitted over objection. Exhibits 5(pgs. 1 and 2) and 11 were not admitted. Complainant offered only Respondent's Exhibit 17, which was admitted.

### **MATTER APPEALED**

Complainant appeals the disciplinary termination of his employment. For the reasons set forth below, the action of the respondent is affirmed.

### **ISSUES**

1. Whether complainant committed the acts for which discipline was imposed;
2. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the range of available alternatives;
4. Whether complainant failed to mitigate his damages;
5. Whether either party is entitled to an award of attorney fees and costs.

## **FACTUAL STIPULATION**

Police Officer Brett Wilson saw no abuse in a white van which he saw stopped on August 15, 1996 at the approximate location of Fifth and Utica in Pueblo, Colorado.

## **FINDINGS OF FACT**

1. Complainant, Ray William Lynch, was employed by respondent, Pueblo Regional Center (PRC), as a Developmental Disabilities Technician for approximately ten years.
2. RY is a 41 year-old mentally retarded male who was a temporary residential client at PRC during the summer of 1996.
3. Donna Leal was employed as a temporary (not to exceed six months) Developmental Disabilities Aide. Leal worked at various PRC residences, depending upon her daily work assignment. She had never worked with Lynch prior to August 15, 1996.
4. In the afternoon of Thursday, August 15, 1996, Lynch and Leal occupied the PRC van with five developmentally disabled clients, including RY. The purpose of the ensuing trip was to take RY home to spend the night with his mother. Lynch was the driver. Leal sat near the back overseeing the clients.
5. RY's mother was not at home when the group arrived. Lynch drove around for a while and came back. Still no one was home. After a third drive around and return to the residence, Lynch left an unsigned note on the door of the house advising the mother to call PRC regarding her son.
6. During the process of driving around and then returning to the PRC residence, RY became upset because he was not able to see his mother. He blamed Lynch, the driver, and told Lynch that he "fucked up." At some point, Lynch stopped the van and confronted RY, stating that he was "tired of this shit." He placed his hands in the area of RY's neck in a choking manner. He shouted

at RY words to the effect that he could put RY in jail. Lynch told RY that his mother was a “bitch” for not being home when she was supposed to be. RY agreed that his mother was a “bitch.”

7. Back at the PRC residence, RY continued to be upset, wondering if he was still in trouble and if he was going to go to jail. The other clients, scared by the incident, remained so.

8. Lynch telephoned Herb Brockman, PRC Residential Services Director, at his home and told Brockman that he had tried unsuccessfully to take RY home and that he believed he was being set up by the mother. Lynch stated that RY tried to exit the van and that he had to grab him to keep him in. Brockman assumed that Lynch was not the driver and that the van was moving when RY tried to jump out. Brockman agreed with Lynch’s decision to not leave RY at home without the mother being present.

9. RY’s mother telephoned PRC at approximately 10:15 p.m. An unidentified male answered the phone, was indignant and told her that he would not go through this again, describing how they had tried to take RY home. The mother later talked to RY, who said that “Bill” and “Herb” were really mad at her.

10. The next day, August 16, at about 7:00 a.m., the mother telephoned PRC Case Management Director Joan Solis to ask for a meeting away from the agency. Solis agreed, and they met at a local restaurant. The mother complained that she had been verbally abused by a staff member.

11. Following the meeting with RY’s mother, Joan Solis went to the PRC residence, where RY and another client, PR, approached her, exclaiming that RY had been choked. Both crossed their hands against their neck. RY also pointed to his arm and said that “he” hit him.

12. Solis went into the residence to see if an incident report had been written. None had been. She then took RY to the administration building and reported the incident. RY wondered if he was in trouble. Solis assured him that he was not. She took him to the sheriff, who asked a few questions, then called the mother, and the three of them met at a restaurant. RY was reunited with

his mother. He has not been at PRC since.

13. On Monday, August 19, RY's mother took him to the Pueblo County Department of Social Services because she had noticed a bruise on his arm. They were interviewed by social worker Shannon Green. By demonstration, RY indicated that he had been grabbed on the right arm and in the neck area.

14. On either August 16 or August 19, RY met with Gerald Avery, his case manager with the Pueblo County Board for People with Developmental Disabilities. RY stated several times that "the guy in the van" grabbed him by the throat. He appeared unusually agitated.

15. As a result of the incident report of Joan Solis, Diane Torres began an internal investigation. Torres issued a written report, concluding that Lynch had physically abused RY. (Exhibit 4.)

16. By letter dated August 27, 1996, Herb Brockman gave Lynch notice of an information exchange meeting to discuss allegations of physical abuse to RY occurring on August 15. (Exhibit 2.)

17. The R8-3-3 meeting was held on September 4, 1996. Lynch stated that he did not grab RY, which Brockman considered contrary to what Lynch had said on the evening of August 15.

18. In making his decision, Brockman relied heavily on the contents of the investigative report and essentially disbelieved Lynch's denials. Also considered were two 1993 disciplinary actions against Lynch, one for client abuse and the other for unauthorized use of mechanical restraints on a client. (Exhibits 15 and 16.)

19. By letter dated September 6, 1996, Brockman terminated Lynch's employment, finding that Lynch had committed physical and mental abuse against a client, RY. (Exhibit 1.)

20. Complainant filed a timely appeal of the disciplinary action on September 13, 1996.

## DISCUSSION

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

The State Personnel Board may reverse or modify respondent's action only if such action is found arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S.

The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987). The fact finder is entitled to accept parts of a witness's testimony and reject other parts. United States v. Cueto, 628 F.2d 1273, 1275 (10th Cir. 1980). The fact finder can believe all, part, or none of a witness's testimony, even if uncontroverted. In re Marriage of Bowles, 916 P.2d 615, 617 (Colo. App. 1995).

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

After a considered review of the entire record in this case, the administrative law judge concludes that it is more likely than not that complainant physically and verbally abused RY. Substantial weight is given to the testimony of Donna Leal, even though two of complainant's witnesses

testified that Leal has a reputation for untruthfulness. Leal's account of events is internally and externally consistent. There is not a hint of a motive for her to fabricate a story. She has no personal interest in complainant's termination or continued employment. She no longer works for the agency. She testified in a straightforward and direct manner. Her testimony finds corroboration in the statements of RY, himself, as well as the statement and gesture of another client who was present when the incident occurred.

The exact location of the choking incident is not totally clear. Whether complainant stopped the van once or twice to confront RY remains in dispute. Nonetheless, it is found that, at a minimum, complainant lost his temper and grabbed RY near or around the neck in a choking fashion, that this action was threatening, unjustified and unwarranted, and that complainant verbally abused RY directly and indirectly abused RY with derogatory comments about RY's mother.

The weight of the evidence leads to this conclusion. Given this serious misconduct, together with two prior disciplinary actions involving inappropriate behavior towards developmentally disabled clients, the action of the appointing authority in terminating complainant's employment was reasonable.

In addition to denying that he physically or verbally abused RY, complainant contends that this proceeding is procedurally flawed on grounds that he was not advised of the specific allegations against him and did not possess sufficient information to refute or mitigate the charges or to tell his side of the story. Complainant's argument is without merit.

Complainant was properly advised in writing that the R8-3-3 meeting would address allegations that he physically abused client RY on August 15, 1996. He was personally interviewed by the internal investigator. He was not cut short at the R8-3-3 meeting. He was afforded the opportunity to present and cross-examine witnesses at an evidentiary hearing before a neutral third party. In sum, there was no due process violation here.

The discipline imposed was within the realm of alternatives available to the appointing authority.

No evidence was presented on whether complainant failed to mitigate his damages.

An award of attorney fees and costs is not warranted under § 24-50-125.5 of the State Personnel System Act.

### **CONCLUSIONS OF LAW**

1. Complainant committed the acts for which discipline was imposed.
2. Respondent's action was not arbitrary, capricious or contrary to rule or law.
3. The discipline imposed was within the range of alternatives available to the appointing authority.
4. Complainant did not fail to mitigate his damages.
5. Neither party is entitled to an award of attorney fees and costs.

### **ORDER**

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this \_\_\_\_ day of  
December, 1996, at  
Denver, Colorado.

Robert W. Thompson, Jr.  
Administrative Law Judge

### **CERTIFICATE OF MAILING**

This is to certify that on the \_\_\_\_ day of December, 1996, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Carol M. Iten  
Attorney at Law  
789 Sherman Street, #640  
Denver, CO 80203

and in the interagency mail, addressed as follows:

Toni Jo Gray  
Assistant Attorney General  
State Services Section  
1525 Sherman Street, 5th Floor  
Denver, CO 80203

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