STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 98 B 073

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROSE M. GONZALES,

Complainant,

v.

DEPARTMENT OF HUMAN SERVICES,
DIVISION OF STATE NURSING HOMES,
TRINIDAD STATE NURSING HOME,

Respondent.

THIS MATTER was heard in evidentiary hearing before Administrative Law Judge Michael Gallegos on March 11, 1998 at 1525 Sherman Street, B-65, Denver, CO. Respondent was represented by Assistant Attorney General Joanna L. Wilkerson. Complainant appeared and was represented by Charles S. Vigil, Attorney at Law.

MATTER APPEALED

Complainant appeals a disciplinary termination. For the reasons set forth below, Respondent's actions are upheld.

PRELIMINARY MATTERS

1. Respondent's Motion for Sanctions

Prior to hearing Respondent filed its Motion for Sanctions requesting that Complainant's evidence be limited to calling the Complainant as a witness because no exhibits or witnesses were timely endorsed by Complainant. On the morning of hearing Complainant's Counsel confessed the

motion and stated that Complainant had no exhibits and would call no witnesses other than Complainant herself.

2. Complainant's Motion to Declare Federal Omnibus Budget Reconciliation Act of 1987 ("OBRA"), 42 C. F. R. Section 483.13 (a) and (b) Unconstitutional.

On the date of hearing, prior to hearing, Complainant, through Counsel, offered a motion requesting that the administrative law judge declare OBRA "void for vagueness" and as such unconstitutional.

The administrative law judge deferred decision and set a date for Respondent, through Counsel, to respond in writing. Respondent argued the Colorado Supreme Court has consistently held that "administrative agencies do not have authority to pass on the constitutionality of statutes and ordinances." *Arapahoe Roofing and Sheet Metal, Inc. V. City and County of Denver*, 831 P. 2d 451, 454 (Colo. 1992); citing *Clasby v. Klapper*, 636 P. 2d 682, 684 n.6 (Colo. 1981), *Kinterknecht v. Industrial Comm'n*, 175 Colo. 60, 67, 485 P.2d 721,724 (1971). See also, *Denver Center for the Performing Arts v. Briggs*, 696 P. 2d 299, 305-306 n. 5 (Colo. 1985), *Industrial Comm'n v. Board of County Comm'rs*, 690 P.2d 839, 844 n. 6 (Colo. 1984), *Lucchesi v. State*, 807 P. 2d 1185, 1191 (Colo. App. 1990).

See also *Horrell v. Department of Administration*, 861 P.2d 1194 (Colo. 1993).

3. Exhibits

Admitted by stipulation were Complainant's PACE reviews contained in Respondent's Exhibit 6.

Respondent's Exhibits 1 through 5 and the remaining portions of Respondent's Exhibit 6, were admitted, over Complainant's objection, as "business documents" exceptions to the Hearsay Rule, C. R. E. 803.

Judicial Notice is taken of Exhibit 7 which was the subject of Complainant's Motion to Declare Federal Omnibus Budget Reconciliation Act of 1987 ("OBRA"), 42 C. F. R. Section 483.13 (a) and (b) Unconstitutional.

4. Witnesses

Respondent called the following witnesses: Complainant Rose M. Gonzales, Coworkers Mr. Rudy Bowman and Mr. Dennis Blan, and Mr. Orlando Gonzales, Administrator for the Trinidad State Nursing Home.

Complainant testified on her own behalf.

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;

2. Whether the actions of Complainant warranted termination;

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

4. Whether Complainant is entitled to attorneys fees and costs.

FINDINGS OF FACT

1. Complainant Rose M. Gonzales was employed by respondent Trinidad State Nursing Home (TSNH) as a Certified Nurses Aid (CNA) whose job duties included patient care, e.g. feeding, toileting, bathing. Complainant was generally an "honest and reliable" employee.

2. In order to properly lift a TSNH resident onto a toilet, a CNA must use a special lift, called a "maxi-lift." When the lift is in use a second CNA must also be present.

3. On or about December 3, 1997 Complainant was caring for Resident #3132, who is also Complainant's Aunt. The resident was initially mispositioned on the toilet by use of the maxi-lift. Complainant and Mr. Bowman, another CNA, then repositioned her, again using the maxi-lift. Unknown to Complainant and Mr. Bowman the resident was still mispositioned and therefore she urinated on the floor.

4. With Mr. Bowman still in the room, Complainant raised her voice at the resident in frustration that "Now I have to clean this up."

5. A few minutes later as Complainant and Mr. Bowman were preparing the resident for bed, Mr. Bowman saw Complainant raise her arm in the direction of the resident. The resident raised her arms and began crying and pointing, asking for something in Spanish. The resident was so upset that neither Mr. Bowman nor Complainant could understand what she wanted.

6. A third CNA, Mr. Dennis Blan, came into the room. He had heard two female voices from across the hall and was more familiar with caring for this resident than Complainant or Mr. Bowman. Mr. Blan was able to determine that the resident wanted her false teeth to be put away.

7. There are many situations, as a CNA in a nursing home, which might cause frustration on the part of the CNA. The proper procedure is to find another CNA to help or take over the activity that is causing the frustration.

8. Mr. Bowman sometimes saw Complainant raise her voice, i.e. "yell", at residents who were not hard-of-hearing.

9. Mr. Blan was aware that some residents were afraid of Complainant because she would speak loudly, "military command" fashion, to residents and because she could be somewhat rough with the administration of "Peri-Care", which is a phrase used to refer to cleaning of the genitals.

10. Mr. Gonzales, the appointing authority, considered the Federal Omnibus Budget Reconciliation Act of 1987 ("OBRA"), 42 C. F. R. Section 483.13 (a) and (b), Complainant's personnel file, Complainant's performance evaluations, a prior corrective action, his own investigation into this incident including statements made by Complainant, including Complainant's denials, statements made by Mr. Bowman, Mr. Blan and Kali Felthager, an LPN at TSNH and he considered alternative forms of discipline.

11. Mr. Gonzales concluded that Complainant's actions on the evening of December 3, 1998 were wilful misconduct.

DISCUSSION

The burden is upon respondent to prove by a preponderance of the evidence that the acts on which the discipline was based occurred and that just cause warrants the discipline imposed. *Department of Institutions v. Kinchen*, 886 P. 2d 700 (Colo. 1994). The administrative law judge, as the trier of fact, must determine whether the burden of proof has been met. *Metro Moving and Storage Co. v. Gussert*, 914 P. 2d 411 (Colo. App. 1995).

Respondent argues that it met its burden both with regard to 1.) whether or not the act occurred and 2.) whether just cause warrants the discipline imposed. Respondent presented evidence in the form of Mr. Bowman's and Mr. Blan's testimony and Exhibits 1 and 2, which indicate that Complainant raised her voice at the resident and raised her arm in a manner that was frightening to the resident. Mr. Gonzales testified that he investigated the matter, considered Complainant's work history including a prior corrective action and he applied the law (Federal Omnibus Budget Reconciliation Act of 1987 ("OBRA"), 42 C. F. R. Section 483.13 (a) and (b)) to insure the safety of TSNH residents.

Complainant testified that she never used the word "damn", that she raised her arm in self defense because the resident had her arms raised and was flailing and that she never struck the resident.

Substantial evidence, including Respondent's Exhibit 3, demonstrate convincingly that the act occurred and that Complainant had a reputation for being verbally abusive and physically rough

with TSNH residents. In this case the act was verbal abuse at the very least. Mr. Gonzales, after investigation, concluded that Complainant struck the resident. This is a reasonable conclusion based on the evidence presented at hearing. Termination was within the alternatives available to him.

Complainant challenged whether just cause warranted the discipline imposed.

Respondent presented significant evidence in the form of Mr. Gonzales' testimony at hearing and Respondent's Exhibit 7 to support Respondent's argument that just cause warrants the discipline imposed. Mr. Gonzales testified that he considered alternatives such as corrective or disciplinary actions. He agreed that Complainant was, for the most part, an "honest and reliable" employee. Nonetheless, the issue here was one of safety, resident safety and the extent to which TSNH complied with the intent and the letter of the law regarding patient treatment.

Actions such as those committed by Complainant in this case effect the continuing health and quality of life of the residents of the Trinidad State Nursing Home. Therefore, the disciplinary action taken in this case is reasonable. This disciplinary action is supported by fact and law and as such is neither arbitrary nor capricious.

CONCLUSIONS OF LAW

1. During the period of her employment, Complainant was verbally abusive to residents of the Trinidad State Nursing Home.

2. Complainant raised her arm to Resident #3132 on the evening of December 3, 1997, which was frightening to the resident.

3. Respondent's action was not arbitrary, capricious or contrary to rule or law. Respondent considered the applicable law and the effect of continued employment of Complainant on the residents of Trinidad State Nursing Home and determined that the resident's safety was at risk, i.e. the discipline imposed was both reasonable and within the range of alternatives available.

4. Complainant is not entitled to an award of attorney's fees and costs.

5. Declaration of federal law as unconstitutional is outside the jurisdiction of an administrative law judge.

ORDER

The action of the respondent is affirmed. Complainant's appeal is dismissed with prejudice.

Dated this 1st
day of May 1998
at Denver, CO

Michael Gallegos
Administrative Law Judge

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 ½ 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.

CERTIFICATE OF MAILING

This is to certify that on this _____day of April, 1998, I placed true copies of the foregoing **INITIAL DECISION** in the United States mail, postage prepaid, addressed as follows:

Mr. Charles S. Vigil
1600 Broadway
#2375
Denver, CO 80202-4923

and in the interoffice mail to:

Ms. Joanna L. Wilkerson
Assistant Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203

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