

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 94B148

INITIAL ORDER OF THE ADMINISTRATIVE LAW JUDGE

JAMES CARROLL,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, f/k/a,
DEPARTMENT OF INSTITUTIONS,
DIVISION FOR DEVELOPMENTAL DISABILITIES,
PUEBLO REGIONAL CENTER,

Respondent.

Hearing commenced on November 25, 1994, reconvened on January 31, 1995, and concluded on February 27, 1995. The complainant, James Carroll, was represented by attorney, Carol M. Iten. Respondent appeared through Herb Brockman and was represented by Stacy L. Worthington, senior assistant attorney general.

Complainant testified in his own behalf. Complainant also called Alfreida C. Baca and Toni Belcher as witnesses.

Respondent called the following witnesses: Jim Duff, the director of the Pueblo Regional Center; Herb Brockman, the case manager for the resident G.R.; Rick Durkin and Darren Adame, Developmental Disability Technicians; Bob Rowtan, a clinical therapist and psychological liaison.

Complainant's exhibits D, H, K (the same document as respondent's exhibit 4), J (the same document as respondent's exhibit 17), and L (the same document as respondent's exhibit 10) were admitted without objection. Complainant's exhibit G was admitted over objection. Respondent's exhibits 2, 3, 4, 5, 7, 8, 9 and 11 were admitted. Respondent's exhibit 10, a transcript of the rule R8-3-3 meeting, was admitted; however, respondent agreed to submit a copy of the tape of the meeting for complainant's review. Complainant counsel was given until March 10, 1995, to review the tape and determine if she wished to file an objection to exhibit 10. ¹ No objection to exhibit 10 has been filed. Complainant's exhibits C, E, M and Q were not admitted.

¹ This date is used for purposes of determining when the initial decision is due pursuant to section 24-50-125.4(3), C.R.S. (10B Repl. Vol. 1995).

MATTER APPEALED

Complainant appeals the disciplinary termination of his employment for willful misconduct prior to the end of his probationary period.

ISSUES

1. Whether complainant proved by a preponderance of the evidence that he did not commit the actions alleged, client abuse;
2. Whether the action of respondent was arbitrary, capricious or contrary to rule or law;
3. Whether either party is entitled to an award of attorney's fees and costs.

PRELIMINARY MATTERS

Respondent filed a motion for summary judgement based on complainant's submission of a confidential document (exhibit B in his information sheet, a treatment plan for the resident G.R.). The motion for summary judgment was denied based on the U.S. Supreme Court's decision in McKennon v. Nashville Banner Publishing Co., U.S. , (No. 93-1543) (1995). At hearing, the respondent continued to argue that the doctrine of after acquired evidence bars any remedy to the complainant. Respondent asserts that the doctrine bars any remedy in situations where the employer can show that it would have terminated the employment relationship based on information obtained after the initial discharge date of the employee which shows the employee engaged in misconduct while employed. Respondent argues that the U.S. Supreme Court's decision in McKennon does not apply because the case at bar does not relate to discrimination. The ALJ ruled at hearing that the analysis in McKinnon does apply to this case. The McKinnon case is not distinguished by the fact that the present case involves a question of employment rights and privileges under the state personnel system rather than discrimination. However, while the doctrine does not create an absolute bar to relief, as articulated in McKennon, it may limit the remedial action awarded to a successful employee.

At hearing, the parties moved to sequester the witnesses. The motion was granted, with the exception of complainant and the respondent's advisory witness. Witnesses were cautioned not to discuss their testimony with anyone prior to the issuance of an initial decision in this matter.

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FINDINGS OF FACT

1. Complainant James Carroll was initially hired as a temporary employee of the Department of Human Services, Pueblo Regional Center in May, 1993. He was hired as a permanent employee in November, 1993, and was a developmental disability technician I ("DD tech") at the time his employment was terminated.

2. The Pueblo Regional Center ("PRC"), part of the Department of Human Services, serves clients who are developmentally disabled. The PRC operates a variety of living quarters and arrangements for the developmentally disabled residents, based on the needs of each individual resident. The DD techs are trained in appropriate ways to handle the residents and their behavioral problems, including intervention techniques to be used when an individual becomes physically abusive to himself or others. PRC stresses non-confrontational intervention.

3. The DD techs employed by PRC are also trained on the policies applicable to confidential client records and information. (Exhibits 2 and 3). The possible consequences for unauthorized possession of, or release of, confidential client records or information include corrective or disciplinary actions.

4. G.R., a resident of the PRC, is about 6 feet tall and weighs approximately 160 pounds. He frequently becomes upset, engages in assaultive behavior directed towards others, destructive behavior directed at property and injurious behavior directed at himself. It is often necessary for DD techs to restrain G.R. G.R. was allowed to interact with the community as part of his treatment program. He had met Carroll's son and daughter on numerous occasions and knew Carroll's fiance, Alfrieda Baca.

5. Bob Rowtan, the Personal Care Alternative coordinator for PRC, performed an assessment to determine the individual needs of G.R. and how best to meet those needs. He determined that G.R. had special needs. Among the items Rowtan considered in his assessment was that G. R. needed to live some distance from neighbors and that an eight member team of DD techs was required to staff his needs on a 2 to 1 basis on a weekly schedule. G.R. was placed in the PRC facility, McCoy house, a non-confrontational setting to address the client's maladaptive behaviors while simultaneously protecting other clients and staff from these same behaviors.

6. Shortly after complainant James Carroll was hired, Bob Rowtan contacted Carroll about working with G. R. Carroll was interested in the assignment and asked for more information. He and Rowtan met to discuss the resident's needs. After this meeting, Carroll decided to accept the assignment with G.R. at the McCoy house. Carroll began work as one of the DD techs assigned to G.R. at the

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McCoy house in May, 1993.

7. On Tuesday, April 19, 1994, Carroll reported to work at the McCoy house. Carroll and Rick Durkin, a DD tech assigned to G.R., worked the same shift. Durkin has worked at PRC since about October, 1990. He had worked at another facility of the Department of Human Services, the Wheat Ridge Regional Center, from 1984 to 1987. At the time G.R. was placed in the special program at McCoy house, Durkin had already worked with G.R. for about four years. At the time of the incident giving rise to the termination of complainant's employment, he had worked at McCoy with G.R. for an additional year. At the time of the incident, Durkin had worked with Carroll for about a year.

8. On April 19, Carroll and Durkin took G. R. for an outing. They bought bread so G. R. could feed the ducks in the park. During the afternoon G.R. asked to go to a candy store. At the candy store he bought several items, cotton candy and a candy apple. He then asked to see Carroll's son, Matt.

9. Durkin, Carroll and G. R. drove to the apartment. Carroll's son Matt was there. When Carroll asked where his fiance, Freida, was, he was told that she was in another apartment in the complex. All three individuals went to the other apartment so that Carroll could see his fiance.

10. When they got to the other apartment, Carroll was on one side of G.R. and Durkin was on the other. Freida Baca answered the door. Freida Baca is 4 feet 11 inches tall and weighs 96 pounds. G.R. screamed, dropped the candy he was holding in hands, and hit her with his hand on the left upper part of her face, including her nose. She fell backwards against the door frame.

11. Carroll took G.R. down to the floor in the hallway. Such "take downs" are common, the DD techs are instructed in the proper technique to use in such situations to avoid harming the resident. Carroll held one of G.R.'s arms behind his back and hit him in the back. Carroll also screamed at G.R.

12. The only people in the hallway who could have witnessed this incident were G.R., Durkin and Carroll. Ms. Baca was in the apartment attempting to recover from the assault by G.R.

13. Durkin told Carroll to stop hitting G.R. and that they should take him to the van. After G.R. had calmed down, Durkin and Carroll began to walk him toward the stairs to leave the building. G.R. walked down 1 or 2 steps and then sat down. Carroll yelled at G.R. to get up.

14. Durkin and Carroll walked G.R. to the van. The van used that day was a Dodge van with side doors. A van, stipulated by the

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parties to have been essentially similar to the one in use on April 19, 1994, was inspected by counsel and the ALJ at hearing. The bottom of the window on the driver's side was about four feet from the ground.

15. When they reached the van, G.R. again began to struggle. Carroll forced G.R. into the van. Durkin directed G.R. to lay on the mat placed at the end of the console between the driver's seat and the other front seat. The mat, which ran under the second row seating in the van in a vertical direction from the front to the back of the van, was used to help the resident calm down and to keeping any potentially violent behaviors from escalating.

16. G.R. attempted to grab a tire iron under the driver's seat, the tire iron was taken away from his reach by Durkin. Carroll got into the drivers seat to drive the van. Durkin knelt straddled over resident with his knees on either side of G.R., holding his arms down and attempting to calm him.

17. Freida Baca came out to the parking lot to return Carroll's sunglasses which had fallen from his pocket during the scuffle. She had washcloth up to her face and indicated that she would be all right. Ms. Baca testified that she wore high heels and that the bottom of the van driver's side window came to mid-chest level on her. She testified that she was able to see through the driver's window, past Carroll in the driver's seat, and observed Durkin kneeling directly on the back of the resident as he lay on the mat.

18. They drove back to the McCoy house with no further incident. Once they got to the McCoy house Durkin and Carroll took G.R. into the house. G.R. was calm until he got between the stove and the cabinets in the kitchen. At that point, he tried to get free from the grip of the two attendants. Carroll took G.R.'s right hand and grabbed his wrist, telling G. R. to be calm. G. R. tried to scratch and bite. Carroll took G.R. to the floor where he stayed for a few minutes until he calmed down. G.R. then said he wanted to go to his bedroom. He was taken into his bedroom where he sat down on his bed. Carroll hit G.R. and yelled at him, telling him not to ever hit anyone in his family again.

19. Durkin told G.R. to take off his boots and relax. Durkin and Carroll did a body audit, taking off G.R.'s shirt and checking for injuries or bruises. Red marks on G.R.'s neck and a red section on his back were noted. Durkin stayed in the bedroom with G.R. attempting to keep him calm and away from Carroll.

20. Carroll went to the living room area to begin drafting the incident report. He also contacted Herb Brockman, the case manager, because he felt it was unusual for G.R. to hit a member of the public.

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21. When Carroll contacted Herb Brockman about what had transpired at the apartment and at McCoy house, Brockman indicated that he felt the incidents were separate and distinct and should be on two incident reports. Brockman agreed that Carroll could leave early to check on Baca if Adame covered his shift.

22. Durkin asked to talk with Brockman. At this time, Durkin told Brockman Carroll had handled everything appropriately. Durkin indicated he said this because he felt Carroll was within earshot and if Durkin reported what had actually happened, Carroll might become angry again and yell at, or attempt to hit, G.R.

23. Carroll called Darren Adame, a DD tech scheduled for the next shift, and asked him to come in early so Carroll could go check on Freida Baca. Adame agreed to come in early. Carroll then called a friend, Toni Belcher, for a ride into town to see Freida.

24. Carroll asked Durkin if he wanted to add anything to the incident reports. Durkin agreed with the complainant's incident report because he feared for the safety of G.R. and wanted the complainant to leave McCoy House as soon as possible.

25. Toni Belcher arrived and talked to Durkin for a few minutes then she and Carroll left.

26. Carroll was in town checking on Frieda Baca about one and one half hours.

27. Darren Adame arrived at McCoy house a few minutes after Carroll had left. Durkin explained to Adame what had happened. They both checked G.R. again for marks. There was some bruising on G.R.'s back, a bruise about an inch in diameter on his lower back, and redness and bruising along the neck and spinal area. Adame and Durkin felt G.R. did not require medical attention and that activity would be good for him.

28. After checking with his fiance, Carroll began to return to McCoy house to finish up the incident reports. Carroll met Adame, Durkin and G. R. at an intersection close to McCoy house. Carroll returned some change to G.R. from the purchases made that day. Carroll yelled at G.R. again about hitting Frieda Baca.

29. Complainant filed his written incident report on April 19, 1994. (Exhibit H). He then took some previously scheduled time off.

30. Durkin violated PRC policy by not reporting the incident immediately. Previously, Durkin had been involved in a report of the use of illegal restraint at another home. As a result of his report, he had received threats from co-workers directed at

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himself and his family. Durkin was scared that the same intimidation and harassment might occur again if he reported Carroll's physical and verbal abuse of G.R.

31. After reflection, Durkin realized that the incident needed to be reported. It had occurred in the community and he assumed a member of the public might report it. Durkin called Brockman and reported the incident. Brockman asked him to submit an incident report, which he did on April 21, 1994. (Exhibit 7).

32. Herb Brockman asked Nancy McDonnell, a registered nurse employed at PRC, to do a physical check on G.R. Brockman did not tell McDonnell why he wanted the physical check done. McDonnell found that there was a discoloration of about one inch in diameter on G.R.'s back in the lower lumbar region. (Exhibit 8). After receiving her April 22, 1994 report, Brockman talked to G.R. who said he had hit her [Freida Baca] and that Carroll had hit him on the head. When asked if there was anything else, G.R. kept repeating that if he did it again it would be "bad."

33. Brockman then talked to Freida Baca. (Exhibit 9). She said that G.R. had hit her and that both Carroll and Durkin had handled it professionally.

34. Brockman sent James Duff, the PRC director and appointing authority, a memo of the incident and investigation.

35. Duff received and reviewed the reports from Carroll and Durkin, McDonnell's report, and the memo from Brockman. He then called Durkin to ask him further questions about his report, including why he had not reported the incident immediately.

36. Duff scheduled a meeting under rule R8-3-3 for April 28, 1994 with the complainant. Kathy Bacino, AFSCME, appeared with Carroll at the meeting as his representative. Carroll denied Durkin's allegations and asked Duff to talk to Baca, Baca's mother, Jerry Pena, Loretta Ramirez and Adame.

37. Duff reinterviewed Adame, who confirmed Durkin's version of the exchange at the intersection. Duff attempted to contact the apartment complex manager to get a telephone number for Loretta Ramirez. Duff asked the apartment manager to let people know if they had any information on the incidents at the apartment complex they should contact him. Duff did not receive any calls. Duff discounted Pena, and Baca's mother as likely to be biased and did not interview them.

38. Duff reconvened the 8-3-3 meeting and presented his information. Carroll again asked Duff to talk to Loretta Ramirez. Duff closed the meeting and tried again to call Ramirez. She finally called Duff. She indicated that she had gone to Baca's

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aid and had looked out a peephole in the apartment door. She saw G.R. with his arm pinned behind his back and with Carroll on top of him.

39. Duff called Carroll's representative, Kathy Bacino, and told her what Rameriz had said.

40. Based on the investigations and the statements made at the 8-3-3 meeting, Duff concluded that Carroll had physically and verbally abused G.R. on April 19, 1994. On May 5, 1994, Duff terminated the complainant's employment for physical and verbal client abuse in violation of agency policy. (Exhibit 5).

41. Carroll filed a petition requesting the Board to grant a hearing on the termination of his employment for willful misconduct prior to the end of his probationary period. Based on the information sheets submitted, the preliminary recommendation was that hearing should be granted. The State Personnel Board granted a hearing on October 21, 1994.

DISCUSSION

Complainant challenges the termination of his employment during his probationary period for wilful misconduct. The burden of proof is upon the complainant to prove by a preponderance of the evidence that the action of the respondent was arbitrary, capricious or contrary to rule or law. Cf., Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

In this case the versions of events by the witnesses on both sides are conflicting in all relevant portions. While credibility determinations are crucial in any case, here credibility determinations are the essential focus of the decision. Evaluation of the credibility of the witnesses can only occur in the setting of an evidentiary hearing where the testimony is sworn and the witnesses are subject to cross-examination. When there is conflicting testimony, as here, 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).

To sustain a finding in his favor, the complainant, as a probationary employee, must do more than put the mind of the trier of fact in a state of equilibrium. 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). See also, Charnes v. Robinson, 772 P.2d 62 (Colo. 1989).

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Taking into account all the facts and circumstances presented in evidence, including the complainant's demeanor, that his testimony was contradicted by several witnesses, and his obvious personal and professional interest at stake in this case, it is concluded that his testimony is not as credible as that of the respondent's witnesses.

It is determined that the testimony of the respondent's witnesses is more credible than that of the complainant's. For example, Freida Baca claimed that Durkin and Carroll had handled the situation properly. However, she had just received a painful blow, one which so concerned Carroll that he asked for permission to leave his shift early so he could check on her. It is unlikely that her recollections of the incidents immediately following the blow are clear. In addition, she was in the apartment and not in the hallway when the incidents in the hallway and on the stairway occurred. She was not in a position to be able to comment on the deportment of either Carroll or Durkin regarding those incidents. Further, she testified that when she went out to return Carroll's sunglasses, the bottom of the van driver's side window came to mid-chest level on her. She testified that she was able to see through the driver's window, past Carroll in the driver's seat, and observed Durkin kneeling directly on the back of the resident as he laid on the mat. A fact she did not report to Duff. After examining the van, stipulated by the parties to have been essentially similar to the one in use on April 19, 1994, the ALJ, who is 2-3 inches taller than Ms. Baca, would not have been able to see what Ms. Baca claims was visible to her. (See finding of fact number 14.)

CONCLUSIONS OF LAW

1. Complainant did not establish by a preponderance of the evidence that he did not physically or verbally abuse the resident G.R.
2. Respondent did not act arbitrarily, capriciously or contrary to rule or law.
3. Neither side is entitled to an award of attorney fees or costs.

ORDER

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

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

Mary Ann Whiteside
Administrative Law Judge

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NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties 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 \$1,031.00. 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 may not 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 Colorado Regulations 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.

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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.

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:

Carol M. Iten
Attorney at Law
American Federation of State, County and Municipal Employees
789 Sherman Street, Suite 640
Denver, CO 80203

and in the interagency mail, addressed as follows:

Stacy L. Worthington
Senior Assistant Attorney General
Department of Law
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1525 Sherman Street, 5th Fl.
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