

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 95B088

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DELBERT QUINTANA,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,
PUEBLO REGIONAL CENTER,

Respondent.

Hearing commenced on March 14, 1995, reconvened on April 13, and concluded on April 14, 1995. The complainant, Delbert Quintana, was represented by attorney, Patricia Marrison. Respondent appeared through James Duff and was represented by Toni Jo Gray, assistant attorney general.

Respondent called the following witnesses: James Duff, the director of the Pueblo Regional Center ("PRC") and complainant Delbert Quintana.

Complainant testified in his own behalf and also called James Duff and Kathy Bacino as witnesses.

Respondent's exhibits 1, 2, 3, 4 (with the agreement of counsel, the ALJ made notations on exhibit 4 to clarify portions which had not copied clearly), 5 and 12 were admitted without objection. Respondent's exhibits 9, 10 and 11 were admitted for a limited purpose over objection from the complainant. Complainant objected to these exhibits, the transcripts of the three 8-3-3 meetings held, as hearsay. The documents were offered by respondent not to prove the truth of any of the matters asserted, but as evidence of admissions against interest made by the complainant, and, to show the procedure used by the appointing authority, including the state of mind of the appointing authority in conducting the investigation and meetings, and the reasonableness of his actions.

Respondent's exhibits 6 and 7 were not offered. Respondent's exhibit 8, a schedule of altered receipts, was excluded pursuant to objections that it was irrelevant, was hearsay, and the accuracy of the figures could not be ascertained. Complainant's objections were based on the following grounds: that it was prepared at some time after the date of termination of complainant's employment; that it was prepared for a different proceeding; that the original from which it had been prepared had been destroyed and so could not be used to determine accuracy;

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and, that it contained triple hearsay.

MATTER APPEALED

Complainant appeals the disciplinary termination of his employment for actions characterized in the termination letter as willful misconduct, violation of agency rules, and exploitation of client funds. However, at hearing, the appointing authority represented repeatedly that the sole reason complainant's employment had been terminated was because of stealing, thus limiting the reason for termination at hearing.

ISSUES

1. Whether respondent proved by a preponderance of the evidence that complainant committed the actions alleged, stealing of resident funds;
2. Whether respondent failed to comply with section 24-50-125, C.R.S. and personnel rules and regulations in terminating complainant's employment;
3. Whether the disciplinary action imposed was arbitrary, capricious or contrary to rule or law;
4. Whether either party is entitled to an award of attorney's fees and costs.

PRELIMINARY MATTERS

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

FINDINGS OF FACT

1. Complainant Delbert Quintana began work with the PRC in January, 1978. At the time of his termination he held the position of a disability technician III ("DDT III") and was the supervisor at the Galatea Home. During his employment with PRC his performance was rated as commendable.
2. The residents of the Galatea Home are developmentally disabled. Galatea residents function on a higher level than most residents

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of PRC's other facilities for the developmentally disabled. For example, Galatea residents are able to benefit from interaction with the community and have numerous outings. Some of the residents are able to hold jobs.

3. The Social Security Administration ("SSA") pays for the basic living expenses of the Galatea residents. This includes payment for three meals a day. The SSA provides \$34 per month to each resident to cover personal items for which PRC is not obligated to pay, i.e., treats, clothes and hygiene items. These allotments are placed in each resident's personal needs account. If a resident has a job, his earnings are also deposited in his account and are available to him for use as noted above. It is considered appropriate for residents to use their withdrawals on their individual account to buy snacks. PRC is obligated to provide meals and if residents are on an outing, or at a job during the lunch hour, PRC provides sack lunches. Further, some of the residents have dietary restrictions, i.e., low calorie, low sodium. For these reasons, numerous meals bought with money withdrawn from a resident's account are considered to be inappropriate.

4. In order to avoid daily requisitions, Quintana routinely did all the cash requisitions from client accounts on a bi-weekly basis on Tuesdays, the money was then replenished on a bi-weekly basis on Wednesdays. This was an acceptable practice at PRC.

5. PRC residents are allowed five dollar withdrawals for "break money." This allows residents to buy snacks such as a candy bar or coffee. It also gives residents an opportunity to manage a portion of their money. No written receipts were required to be submitted with the requisition forms for withdrawals of \$5.00 or less. A supervisor had the discretion to determine whether or not to require receipts in such cases. In addition, receipts were not required for withdrawals of a resident's personal needs money to go to the State Fair or to participate in vacation times scheduled by Galatea. At the time period relevant in this matter, the PRC did not have written procedures specifying the exact detail and the steps to be used in accounting and receipting withdrawals of money from resident accounts. Prior to this case, PRC had not known of a problem with insufficient documentation accompanying requisitions or an unusual number of requisitions of \$5.00 or less.

6. During his tenure, Quintana worked at Galatea and another home under the supervision of several managers at different periods of time. Under the supervision of Gilbert Valdez, Quintana was responsible for the residents' personal needs accounts. During this period, his requisition records and receipting practices were in compliance with the accepted practice at PRC.

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7. Quintana required the employees at Galatea to provide him with receipts for reimbursements from residents' accounts. Quintana sometimes attached the receipt to the requisition form but most of the time he did not.

8. James Duff, director of PRC, is the appointing authority. A Galatea employee, Rita Pacheco, had concerns regarding the expenditures from a Galatea resident's funds. This concern caused a detailed review of the cash requisition forms for the personal needs funds of Galatea residents.

9. Rita Pacheco, expressing frustration that there were insufficient funds in the client's account to purchase needed clothes, asked the individual responsible for review of expenditures from personal needs funds, John Vallejos, to review this particular account. Some time prior to this, the complainant and Joan Solis had questioned Pacheco on her purchase of clothing for a resident. They determined that she had improperly commingled funds; however, they found her explanation of events to be rational and did not take disciplinary action.

10. Duff asked Larry Dalton in the accounting office at PRC for a full accounting of Galatea residents funds withdrawals over a period of time. Duff's review showed that for the period February, 1994 through November, 1994, there were numerous withdrawals in increments of \$5.00 or less. During the nine month period at issue, in the personal needs accounts of the eleven Galatea residents, there were 194 withdrawals of five dollars totalling \$970.00, and 27 withdrawals of less than \$5.00. The total withdrawals during the nine month period was slightly over \$1,000. Comparing the Galatea withdrawals to those of other homes, Duff determined that both the number and amount of withdrawals at Galatea were unusually high.

11. Reviewing the requisitions from Galatea for the 1994 State Fair, Duff determined that a total of \$315.00, in amounts varying from \$20.00 to \$100.00, was distributed to six Galatea residents. The average State Fair withdrawal at Galatea was slightly over \$50.00. Duff compared the Galatea average to State Fair requisitions at other PRC homes. The other homes averaged \$10.00 per client.

12. Duff reviewed the requisitions for vacation expenditures at Galatea during the nine-month period. He found a total of \$180.00 in withdrawals for six individuals. Withdrawals at Galatea for vacation expenditures averaged \$30.00 per person. Duff was concerned that he was unable to determine how these moneys were spent.

13. Duff questioned a February, 1994 repair to a blue jacket which did not belong to the resident to whom the repair was originally

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billed. (exhibit 4) Quintana had gone through Galatea residents' closets to determine that each resident had appropriate clothing for the weather. He found a blue jacket with a broken zipper in a resident's closet. It was this jacket he sent for repair. It is common for residents to sometimes pick up another's clothing by accident and to leave or lose items of clothing. Upon determining that the jacket did not belong to the resident, or to any other Galatea resident, Quintana personally reimbursed the resident's account with Quintana's own money. (exhibit 5)

14. From his review of the Galatea requisitions, Duff was also concerned about what he felt were instances of inadequate receipts and receipts in which a portion appeared to be torn off. On exhibit 2, Quintana noted a withdrawal from resident "M.S." for \$5.49. The receipt attached to exhibit 2 indicates that the top of the receipt was torn off. Thus, there was no printed detail of what was bought, on what date and where. Later, during the 8-3-3 meetings, Quintana explained that he recognized the receipt as being from Sonic, a Pueblo restaurant, and he had noted on the back of the receipt what the employee said the resident had ordered.

15. Quintana sometimes tore off parts of receipts when a receipt contained charges to both an employee and a resident. Quintana indicated he noted the portion of the total attributable to the resident. He was aware that he could have attached the entire receipt and noted only the portion ordered by the resident was being reimbursed. This second procedure would result in complete receipts containing date, place and detail of what was purchased. Duff was also concerned that on withdrawals for some outings, Quintana distributed the total bill for food equally among the residents regardless of what they had ordered. (exhibit 3)

16. Duff counseled John Vallejos that Vallejos should review requisition forms more carefully as the forms come in and that unusual numbers of withdrawals or insufficient documentation should have been brought to Duff's attention as soon as possible. No disciplinary action was taken.

17. On November 28, 1994, Duff sent Quintana notice of his concerns and that an information meeting under rule R8-3-3 would be scheduled. (exhibit 12) The letter asked that Quintana call and schedule a meeting time with Duff during the week of December 5th.

18. The initial 8-3-3 meeting was held on December 9. (exhibit 9) Present were Duff, Quintana, and Quintana's representative, Robert Ruybal from AFSCME. After several hours, the meeting was suspended. Duff indicated he would investigate the issues raised by Quintana. It was also discussed that Quintana and his representative would use the time before the next meeting to

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review the receipts.

19. Quintana said that the resident receiving the \$100 withdrawal for the State Fair had gone to the fair several times. Quintana said that he had personally taken him on one occasion. During his investigation, Duff talked with Dave Marez, the staff member working directly with the resident and who had taken him to the 1994 State Fair on one occasion. Marez, a part-time employee at Galatea, indicated that the resident had gone to the State Fair only once. Further, the resident during the relevant time period was having psychological difficulties and not participating much in group activities. He also had difficulty in eating and was not eating regularly.

20. Quintana estimates that the most this resident would have spent during all visits to the 1994 State Fair was \$50.00. Quintana did not redeposit the remaining \$50.00 to the resident's account. Rather, Quintana testified at hearing because the money was already withdrawn, he used it in small increments for various small purchases for the resident over a period of time. There are no receipts for these expenditures.

21. Duff also looked into the manner in which \$5.00 or less withdrawals were receipted under two other previous supervisors at Galatea, Gilbert Valdez and Ben Colon. He found that there were withdrawals of \$5.00 or less, but not as many as under Delbert Quintana.

22. A second meeting was held on December 14, 1994, as a follow up. (exhibit 10) At the end of this meeting, it was agreed complainant and his representative could have 24 hours to put in additional information. Neither Quintana nor Ruybal submitted any further information.

23. The third 8-3-3 meeting was held on December 16, 1994. (exhibit 11)

24. In reaching his decision as to what, if any, disciplinary action to impose, Duff considered Quintana's employment record with PRC. Quintana had high evaluations and had no prior corrective or disciplinary actions. He considered the fact that Quintana used his own personal funds to repay the resident's account for the cost of the jacket repair as indicative that Quintana was trying to right an intentional wrong.

25. On December 19, 1994, Duff sent a certified letter to Quintana terminating his employment based on Board rule R8-3-3(C), willful misconduct (violation of agency rules) and PRC Policy 1.4.A2., exploitation (defined as "an illegal or improper action affecting a person or the use of the person's resources for another person's profit or advantage"). (exhibit 1) Duff also wrote that Quintana

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has " ... a fiduciary responsibility to properly maintain and account for the personal funds within ... [his] control and are in a position of trust for the people living at PRC."

26. Quintana filed a timely appeal on December 28, 1994.

27. At hearing, in responses to several questions, Duff stated that the sole reason for terminating Quintana's employment was because Quintana had stolen resident funds. Duff did not terminate Quintana's employment for inadequate or sloppy accounting practices regarding resident accounts.

DISCUSSION

Complainant argues that the process used in this termination was procedurally defective. This argument is incorrect. The procedures used meet the requirements as discussed in Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); Ramsey v. University of Colorado Health Sciences Center, State Personnel Board case number 912 B 033 (affirmed 93CA0716 N.S.O.P. August 11, 1994).

The termination letter cites willful misconduct and exploitation as the reasons for the action taken. However, the testimony of the appointing authority, James Duff, focused on allegations of stealing. Further, on several occasions, Duff expressly stated that he did not terminate complainant's employment because he inadequately monitored his employees or the resident accounts, but because he believed that the complainant had stolen money from the residents.

The phrase "to steal" in common usage means:

to take the property of another wrongfully ... to take or appropriate without right or leave and to take with intent to keep or make use of wrongfully

Websters Collegiate Dictionary, 10th ed. (1993)

The concept "to steal" is defined in Black's Law Dictionary, 6th ed. (1991) as:

... denotes the commission of theft ... the felonious taking and carrying away the personal property of another, and without right and without leave or consent of the owner, and with intent to keep or make use wrongfully. ...

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Duff testified the only reason he took the disciplinary action against Quintana was for stealing. Normally, the reasons cited in a termination letter are dispositive to determine the parameters of the issues at hearing. Here, however, Duff's direct testimony, given after reflection and ample opportunity to consult with the agency's counsel, was that the sole reason he terminated Quintana's employment was for stealing, not for sloppy, inadequate accounting constituting a breach of fiduciary duty. A person normally employs the words which most directly and aptly express the ideas they intend to convey. Duff clearly intended to convey that Quintana's employment was terminated because he had stolen resident funds.

The evidence presented shows a serious lapse of fiduciary responsibility on the part of Quintana. This ALJ is disturbed by the evidence and would have sustained the termination on the initial reasons proffered in the termination letter. However, the appointing authority clearly stated several times in direct testimony that he terminated the complainant's employment because he stole client funds. It is axiomatic that you never plead what you need not, lest you oblige yourself to prove what you cannot.¹ As Oliver Wendell Holmes wrote, "whatever the consequences we must accept the plain meaning of plain words." United States v. Brown, 206 U.S. 244 (1907). The ALJ must accept the testimony and reasons stated and narrow the focus of inquiry to whether the respondent proved by preponderant evidence that the complainant stole client funds. The evidence presented does not prove by a preponderance standard that the complainant committed acts which meet either the regularly accepted legal or common understanding of the term stealing.

Respondent argued that Quintana made a number of admissions during the 8-3-3 meetings. Respondent contends that the statements transcribed on pages 14 - 15 of exhibit 10, the transcript of the December 12, 1994 meeting, are an admission by Quintana that he stole money from Galatea residents personal funds accounts. (The critical statement and response relied upon by the respondent is highlighted in bold.) In pertinent part, it reads:

Duff: Charging these clients with and you know I said why would the top be missing? Somebody is giving them to you, why are they taking the top off?

Quintana: My guess is probably they you know, and I have seen it, you know, and I'm gonna take full responsibility for this

¹ Abraham Lincoln, Letter to Usher F. Linder, 20 Feb. 1848, in *Collected Works of Abraham Lincoln* 1:453 (Roy P. Basler ed. 1953).

because I said nothing, you know, but there were a few times when Dave I know has gone out on a, on an outing with somebody and you know the receipt was just way over something that you know this individual could have. You know and it wouldn't be

Duff: Dollar-wise or quantity-wise or what?

Quintana: Yeah, well both.

Duff: What, that, that I bring back a receipt and it has ten hamburgers on it and it was just me and somebody else?

Quintana: Yeah.

Duff: So what happens?

Quintana: So...

Duff: You tear the top off?

Quintana: Well, yeah I've done it a couple times, yeah, but that's just you know just for the you know, like said, you know I am guilty. But it's not.

Duff: So if somebody is paying for ten hamburgers and they only ate one?

Quintana: Well it's not what you say that great of amount yeah.

Duff: I'll grant that the example is an exaggerated one

Quintana: Yes.

Duff: But the idea is that, that an individual that lives here may have taken something that they didn't actually receive benefit for?

Quintana: Right.

Adoptive admissions against interest are exempted from the concept of hearsay evidence on the basis that it is reasonable to expect any person who hears a statement accusing him or her of misconduct to deny it. People v. Green 629 P.2d 1098 (Colo. App. 1981). It has been stated that:

Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is

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perhaps the most important part. National Labor Relations Board v. Federbush Co., 121 F.2d 957 (2d Cir. 1941).g

Even viewing the discourse between Quintana and Duff with this gestalt standard, it is not possible to define any statements made as an admission against interest. There is no showing that the complainant heard and understood the highlighted statement as an accusation of misconduct, much less one of stealing. Green, supra, 629 P.2d 1098.

Although the action of the appointing authority is overturned, complainant is not entitled to an award of attorney fees and costs. The action proven, breach of fiduciary obligation, would have sustained a disciplinary action. Sena v. Department of Institutions, State Personnel Board case number 93B029.

CONCLUSIONS OF LAW

1. The procedures followed by the respondent in the termination of complainant's employment did not violate section 24-50-125 or any rule of the State Personnel Board.
2. Respondent did not establish by a preponderance of the evidence that complainant stole personal needs funds from Galatea residents.
3. Respondent acted arbitrarily, capriciously or contrary to rule or law.
4. Neither side is entitled to an award of attorney fees or costs.

ORDER

The action of the appointing authority, terminating complainant's employment, is overturned. Complainant is to be reinstated to the position he previously held at PRC, with back pay and benefits, less any appropriate offsets, to be paid from the date of termination to the date of reinstatement.

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DATED this ____ day of
May, 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 **\$1,050.00**. 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 by 11 inch paper. 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.

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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 May, 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:

M. Patricia Marrison
Attorney at Law
733 E. Costilla St. #A
Colorado Springs, CO 80903

and in the interagency mail, addressed as follows:

Toni Jo Gray
Assistant Attorney General
Department of Law
Human Resources Section
1525 Sherman Street, 5th Fl.
Denver, CO 80203

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