
INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROSE PEREZ,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,
COLORADO MENTAL HEALTH INSTITUTE AT PUEBLO,

Respondent.

The hearing in this matter was held on April 8, 1996, in Denver before Margot W. Jones, administrative law judge (ALJ). Respondent appeared at the hearing through Stacy Worthington, assistant attorney general. Complainant was present at the hearing and represented by Carol Iten, attorney at law.

Respondent called as witnesses at hearing: Steve Shoemakers; Rose Perez and Irene Drownicky. The parties stipulated to the admission of exhibits 1 through 8. Respondent's exhibit 24 was admitted into evidence without objection.

Complainant called Paul Barella as a witness to testify at hearing. The parties stipulated to the admission into evidence of exhibit B.

MATTER APPEALED

Complainant appeals the termination of her employment with the Colorado Mental Health Institute at Pueblo as a licensed psychiatric technician.

ISSUES

1. Whether complainant engaged in the acts for which discipline was imposed.
2. Whether complainant's conduct constituted a failure to comply with standards of efficient service and competence.
3. Whether the decision to terminate complainant's employment was arbitrary, capricious or contrary to rule or law.
4. Whether either party is entitled to an award of attorney fees

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under section 24-50-125.5 C.R.S.(1988 Repl. Vol. 10B).

FINDINGS OF FACT

1. Complainant Rose Perez (Perez) was employed by the Colorado Mental Health Institute at Pueblo (CMHIP) as a licensed psychiatric technician (LPT). The appointing authority for Perez' position was Irene Drewnicky (Drewnicky). Perez was employed by CMHIP for 33 years.

2. Perez, as an LPT, was expected to take the vital signs of the patients assigned to her care. She was also required to comply with the professional standards of the nursing practice act, section 12-42-113(h), C.R.S.(1991 Repl. Vol. 5B). This section of the act provides that grounds for disciplinary action by the State Nursing Board may include the falsification of or making in a negligent manner incorrect entries on patient records. Perez is also required to meet the standard of care required by CMHIP policy which provides that, "[t]he medical record is documented in an accurate and timely manner . . ."

3. On or about December 6, 1995, Perez' supervisor, RoseMary Trujillo (Trujillo), became aware of the fact that on December 5, 1995, Perez entered a patient's vital signs into the patient's medical record after the patient was released from CMHIP on December 4. Perez did not actually take the patient's vital signs. She merely entered numbers in the chart.

4. On December 6, 1995, Perez was counselled by her supervisor about her documentation practices and completing assignments. During the counselling, Perez admitted that she falsified the documentation of the patient's vital signs. Perez explained that this was a practice she followed, referred to as "radaring" the patient. She explained that she was trained to "radar" patients by the nursing staff.

5. Trujillo advised her that this practice presented a safety issue for the patients and compromised the quality of care provided at CMHIP.

6. On December 6, 1995, Trujillo prepare a performance progress review form which noted several job performance problems. Trujillo noted that Perez took extended lunch hours and breaks, she fell asleep while on duty, she left her assigned unit unattended and she failed to complete assigned duties related to patient care.

7. On December 15, 1995, Trujillo advised her supervisor and Perez' appointing authority, Drewnicky, about Perez' actions on December 5 when she "radared" the patient.

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8. Drownicky was acquainted with Perez' job performance. She requested that Steve Shoemakers (Shoemakers) meet with Perez for a R8-3-3 meeting to discuss with her the practice of "radaring" patients. Drownicky delegated her appointing authority in order to insure that Perez had the opportunity to present information to an unbiased third party.

9. By certified mail dated December 27, 1995, Perez was advised that Shoemakers would meet with her on January 4, 1996, for a R8-3-3 meeting. Shoemakers advised Perez that the meeting was for the purpose of discussing "allegations that you had written vital signs in the medical record on a patient that had been discharged the pervious day". Perez did not pick up the certified mail letter.

10. On December 29, 1995, Perez received a performance planning and appraisal form in which she received an overall job performance rating of "needs improvement" covering the period from October 27, 1995, to December 28, 1995. The job performance rating noted that Perez had problems maintaining patient records and failed to complete documentation in a timely manner.

11. On December 29, 1995, Drownicky met with Perez, her representative, Paul Barella, and Ben Fransua, a CMHIP manager, to discuss her December 29, 1995, performance rating. Drownicky discussed with Perez the three areas in which she needed to improve her job performance. These three areas were clinical record keeping, clinical skills and patient care, and organizational commitment and adaptability. A discussion occurred with Perez concerning Perez' record keeping on December 5, 1995, when she wrote vital signs in a patient's record without actually taking the patient's vital signs.

12. During this meeting, Perez was advised that as a result of her poor job performance she would receive a counselling note and corrective action.

13. On January 9, 1996, Shoemakers sent by certified mail to Perez another letter giving her notice of a R8-3-3 meeting to be held on January 18, 1996. The notice advised Perez that the meeting would be held to consider whether disciplinary should be imposed as a result of Perez' actions in "radaring" a patient on December 5, 1995. Perez was further advised that other job performance problem had been brought to his attention during his investigation and that these job performance problems would also be considered at this meeting.

14. On January 18, 1996, Perez received the corrective action and performance improvement plan of which she had been advised of on December 29, 1995. The corrective action was signed by Drownicky.

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The corrective action reflected that Perez need improvement in the areas of clinical record keeping, clinical skills and patient care and organizational commitment and adaptability.

15. The corrective action further advised Perez that she must improve, as follows:

1. Complete and maintain all assigned and expected documentation at a standard level of quality, in a timely fashion as instructed by your supervisor, as pre defined in the policy and procedure manual and determined standards of practice on the ward.
2. Complete treatments as ordered and assigned within the appropriate time frame. Treatments will be performed at a professional level as accepted by community standards of care for nursing staff, (LPTs).
3. You will be ready, willing and prepared to work your full shift without unauthorized extended breaks, lunches, or early departures from your shift or late arrivals to work. All leave must be approved prior to the leave. Sick leave must be approved by calling your supervisor 1 hour prior to the time your (sic) are scheduled to work.

16. Perez was directed in the January 18, 1996, corrective action that she would be required to complete the corrective actions by the following dates:

Number 1 & 2 (above) are standard expectations and you are expected to comply with the actions immediately starting from the time of your PACE review, Dec. 27, 1995. This will be an ongoing expectation. Number 3: improvement in your attendance and procedure for calling off is expected beginning Dec. 27, 1995 and continued.

17. On January 30, 1996, Perez and her representative met with Shoemakers for a R8-3-3 meeting. This meeting began by Shoemakers explaining that his notice of the meeting indicated that the meeting would be held not only to discuss the December 5 incident when she radared the patient, but it would also be held to consider the other on going performance problems. Shoemakers further explained to Perez that since the other on going job performance problems were already discussed with Perez during her December 29, 1995, meeting with Drewnicky, the only issue to be addressed at the R8-3-3 meeting would be the "radar" incident.

18. Perez and her representative protested. They explained to Shoemakers that all job performance issues were discussed with Perez during the meetings with Trujillo and Drewnicky during

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December, 1995. Perez further explained that she specifically discussed the "radar" issue when she met with Drewnicky and Fransua on December 29, 1995, and was advised that she would receive a corrective action and a counselling note.

19. Over Perez' protest, Shoemakers went forward with the R8-3-3 meeting. Perez explained that "radaring" was a common practice at CMHIP used when time did not permit more careful examination of the patients. She also explained that it was a practice she learned from the nursing staff. She conceded that the practice created health risks for the patients, since a physician's determination with regard to a patient's condition and the dosages of medications to be administered are determined on the basis of vital signs.

20. Following the R8-3-3 meeting, Shoemakers decided to terminate Perez' employment. He concluded that Perez' actions on December 5, 1995, created a significant health risk for CMHIP patients. He further concluded that her actions did not meet the standard of care required by the State Board of Nursing and CMHIP policy. Shoemakers decided that Perez' actions constituted a failure to comply with standards of efficient service or competence.

DISCUSSION

Certified state employees have a protected property interest in their employment and the burden is on Respondent in a disciplinary proceeding to prove by a preponderance of the evidence that the acts on which the discipline was based occurred and just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); Section 24-4-105 (7), C.R.S. (1988 Repl. Vol. 10A). The board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously or in violation of rule or law. Section 24-50-103 (6), C.R.S. (1988 Repl. Vol. 10B).

The arbitrary and capricious exercise of discretion can arise in three ways: 1) by neglecting or refusing to procure evidence; 2) by failing to give candid consideration to the evidence; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

Pertinent to a discussion of this case is Board rule, R8-2-5(A), which provides,

Employees performing at an overall level of Needs Improvement shall be given a corrective action for the initial needs improvement rating and afforded a period of time to improve performance as provided in R8-3-2(B). . . .

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Also pertinent to this discussion is Board Policy 8-3-(A). The policy states,

An employee may not be corrected or disciplined more than once for a single specific act or violation.

This case rests on credibility determinations. When there is conflicting testimony, as here, the credibility of 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); Barrett v. University of Colorado Health Science Center, 851 P.2d 258 (Colo. App. 1993).

Respondent contends that it has sustained its burden of proof and established that complainant engaged in the conduct for which discipline was imposed, that the decision to impose discipline was warranted and that the discipline imposed was within the range available to a reasonable and prudent administrator.

Complainant contends that respondent's actions were arbitrary, capricious and contrary to rule and law. Complainant concedes that she did the acts for which discipline was imposed, but she contends that she was corrected for those acts and she cannot also be disciplined for the same acts.

Respondent has the burden of proof in this matter. Based on the evidence presented at hearing, it could not be determined by preponderant evidence that respondent's only effort to correct or discipline complainant for the December 5, 1995, incident occurred in the February 12, 1996, letter of termination.

Drewnicky testified that she was well aware that the R8-3-3 meeting was pending with Shoemakers when she met with complainant on December 29, 1995. She testified that since she had this knowledge she did not discuss the December 5, 1995, incident with Perez.

However, the record does not support the conclusion that CMHIP managers addressed complainant's job performance in the series of meetings in December, 1995, and January, 1996, in a manner which can be found to be consistent with Board policy. While Drewnicky knew that she delegated appointing authority to Shoemakers, it is confusing that the first notice of the R8-3-3 meeting references only the December 5, 1995, incident and the second R8-3-3 letter references both the December 5 incident and "ongoing job performance problems".

Furthermore, from December 6, 1995, forward, complainant was involved in counselling and discussions with her supervisors about the December 5 incident. Complainant met with Trujillo on

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December 6 and then with Drownicky on December 29. The evidence established that while the performance rating was based on a number of factors, the December 5 incident was one of the job performance problems which caused complainant to receive the "needs improvement" rating and corrective action.

It might be argued that respondent was compelled by Board rule, R8-2-5(A) to give complainant the corrective action as a result of the "needs improvement" rating. However, such an argument is not supported by the record. It is respondent's contention that it did not impose the corrective action for the December 5 incident. It is respondent's further contention that the December 5 incident was not discussed at the December 29, 1995. So this case does not turn on an agency's efforts to address serious misconduct and to comply with R8-2-5(A). This case turns on the witnesses' credibility and their testimony about the December 29, 1995, meeting.

The witnesses, Barella, complainant, Shoenmakers and Drownicky were found to be equally credible. In a case such as this where the evidence weighs equally, the party having the burden of proof cannot prevail. It is concluded that complainant was corrected for the December 5, 1995, incident during the December 29, 1995, meeting with Drownicky and that a corrective action was placed in writing and provided to complainant on January 18, 1996. Under the Board policy quoted above, since complainant was corrected for the December 5 incident, she could not be disciplined for the same incident a short 25 days later.

Based on the evidence presented at hearing, there is no basis to conclude that either party is entitled to an award of attorney fees under section 24-50-125.5 C.R.S. (1988 Repl. Vol. 10B).

CONCLUSIONS OF LAW

1. Complainant conceded that she engaged in the acts for which discipline was imposed
2. The decision to terminate complainant's employment violated Board Policy 8-3(A) because complainant received a corrective action for the same conduct which formed the basis of the decision to terminate her employment.
3. Neither party is entitled to an award of attorney fees.

ORDER

Respondent is directed to rescind the notice of termination dated February 12, 1996. Respondent shall reinstate complainant to her position with CMHIP as a LPT and award her full back pay and benefits, from the date of termination to the date of

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reinstatement, less appropriate offset.

DATED this _____ day of
May, 1996, at
Denver, Colorado.

Margot W. Jones
Administrative Law Judge

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CERTIFICATE OF MAILING

This is to certify that on the _____ day of May, 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 Iten
Attorney at Law
789 Sherman Street #640
Denver, CO 80203

and to the respondent's representative in the interagency mail, addressed as follows:

Stacy Worthington
Assistant Attorney General
State Services Section
1525 Sherman St., 5th Floor
Denver, CO 80203

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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. 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 estimated cost to prepare the record on appeal in this case without a transcript is **\$50.00**. 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

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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 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.