

STATE PERSONNEL BOARD, STATE OF COLORADO  
Case No. 97B065

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INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE  
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PATRICIA REINHARDT,

Complainant,

vs.

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

Respondent.  
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The hearing in this matter was convened on February 12, 1997, before Administrative Law Judge Robert W. Thompson in Denver. The hearing was adjourned and reconvened in Pueblo, CO before Administrative Law Judge Margot W. Jones on June 6 and 7, 1997, and October 21 through 23, 1997. Respondent appeared at hearing through Assistant Attorney General Toni Jo Gray. Complainant, Patricia Rinehardt, was present at the hearing and represented by David E. Ware, Attorney at Law.

Respondent called the following employees of the Department of Human Services to testify at hearing: Burt Webber; Karen Patterson; Mary Herman; Scott Hertnecky; Rosemary Trujillo; Marcie Caraballo; Lee Ann Gilbert; Doris Jean Sundell; Pamela Warren; Janet Abbott; Sue Latino; and William Sherman. Complainant testified in her own behalf and called the following current and former employees of the Department of Human Services: Monica Bobbian; Vickie Daughtery; James Aragon; Loretta Kennedy; and John Felix.

The following Respondent's exhibits were admitted into evidence without objection: 1 through 5, 7, 8, 28 through 40, 42, 45, 46, 48 through 50, 52 through 54, 57 through 59, 65 and 71, page 6. Respondent's exhibits 27, 55, 56, and 68 were admitted into evidence over objection. Respondent's exhibit 22 was offered into evidence but was not admitted.

Complainant did not offer exhibits into evidence at hearing.

**MATTER APPEALED**

Complainant appeals her termination from employment.

### ISSUES

The following issues were raised by the parties at hearing:

1. whether complainant engaged in the conduct for which discipline was imposed;
2. whether the conduct proven to have occurred constitutes violation of the rules of the State Personnel Board;
3. whether the decision to terminate Complainant's employment is arbitrary, capricious, or contrary to rule or law; and
4. whether either party is entitled to an award of attorney fees and cost.

### PRELIMINARY MATTERS

The hearing in this matter was convened before Administrative Law Judge Robert W. Thompson in Denver on February 12, 1997. The testimony of Respondent's witness Janet Abbott was taken. Thereafter, the administrative law judge was not able to complete the case due to illness and the undersigned was assigned to hear this matter. The parties agreed to have Janet Abbott testify before the undersigned.

### FINDINGS OF FACT

1. Complainant, Patricia Rinehardt (Rinehardt), began her employment with the Colorado Mental Health Institute at Pueblo (CMHIP) as a registered nurse in April, 1994. Rinehardt's employment was terminated for "blatant" misconduct and willful failure to perform duties assigned on November 18, 1996. During Rinehardt's employment with CMHIP, she maintained a good employment record, receiving "commendable" performance ratings and never receiving a corrective or disciplinary action.
2. At the time relevant to this appeal, prior to November 18, 1996, Rinehardt worked on the General Adult Psychiatric Service (GAPS), Ward 67. She was assigned to work the third shift from 11 p.m. to 7 a.m. The mission of CMHIP is to provide quality care for the severely mentally ill. The patients of Ward 67 include patients suffering from serious illness, both physical and mental.
3. In the fall of 1996, Rinehardt worked under the supervision of John Felix, Shift III Supervisor. The duly delegated appointing authority for Rinehardt's position was Irene

Drewnicky, Division Director for GAPS. Drewnicky was verbally delegated appointing authority to consider discipline against Rinehardt on November 1, 1996, during a conversation between Drewnicky and Steve Schoenmakers, the appointing authority for employees of the GAPS. This delegation was reconfirmed in writing following issuance of the disciplinary action taken against Rinehardt on November 18, 1996.

4. As a registered nurse on Ward 67, Rinehardt was a work leader. John Felix, Rinehardt's immediate supervisor, supervised several wards at CMHIP. The staff on Ward 67 spent a considerable amount of time without his direct supervision. Rinehardt took the lead in her work on the ward with Jimmie Aragon, Vickie Daughtery, and Deborah Monet. During the staff's days off or during illness, staff from other wards were assigned to work Ward 67 on the third shift. Staff assigned to cover the ward looked to Rinehardt for direction in carrying out their duties on the ward.

5. Drewnicky learned in the early part of 1996 that patient checks were not occurring on Ward 67. The nursing standards act and the policies of CMHIP require that patients be checked on an hourly basis. Patients on suicide watch or patients in seclusion and restraints must be checked every 15 minutes. These checks are required to be documented in a log by the staff. The patient checks are intended to provide quality care preventing patient suicide and injuries and might occur while a patient is in restraint. Patient checks also insure the safety of staff and avoid injury suffered by patients while in restraints and seclusion.

6. John Felix, Ward 67 supervisor during 1996, frequently warned the staff on the third shift that they needed to do patient checks as required by CMHIP policy and nursing standards.

7. Drewnicky received evidence in September, 1996, that patient checks were not occurring on the third shift on Ward 67. During an investigation into a specific incident involving John Felix and Jimmie Aragon's failure to perform patient checks, Drewnicky learned that Rinehardt also failed to perform patient checks. On numerous occasions during 1996, Rinehardt failed to check patients. During 1996, when staff from other wards were assigned to work on third shift Ward 67, they were discouraged by Rinehardt from doing patient checks.

8. Staff working the third shift on Ward 67 were expected to work a straight eight hour shift. The straight eight hour shift is considered an exception to the provisions of the Fair Labor Standards Act. The staff was permitted to take two twenty minute

breaks during their shift. These breaks were dictated by the needs of the patients on the ward. In the event that staffing was not adequate or that patients needed additional care, staff was expected to forgo their breaks.

9. For the safety of the staff and patients, no fewer than two staff members were to be left on Ward 67 third shift. In general, a minimum of four staff members were on duty on the ward.

10. Routinely, Rinehardt and her co-workers, Jimmie Aragon, Deborah Monet, and Vickie Daughtery would go to a dock area a distance from Ward 67 where they smoked cigarettes and took their breaks. Rinehardt frequently took more than two breaks during her shift and the breaks extended beyond the 20 minutes permitted by CMHIP policy. During these breaks, one staff member was left on Ward 67 out of the sight and hearing of the staff on their break in the dock area.

11. During the same investigation conducted by Drownicky, she received information that staff on the third shift on Ward 67 was stealing food from a locked kitchen located not far from the ward. The food was state property to be used to feed patients. The public safety office had been investigating the theft of food from this locked area since June, 1995.

12. Rinehardt and her co-workers on Ward 67 were routinely removing food from the locked kitchen area. The food would be shared with the staff on Ward 67. Numerous food items such as a roast beef, salsa, fruit, cheese, and bread were removed from the kitchen by Rinehardt and her co-workers.

13. Staff on the third shift Ward 67, including Rinehardt, also failed to appear for work and account for their time. Occasionally, Rinehardt failed to call in or appear for work. Time records were altered so that Rinehardt was not required to be accountable for her absences from work. Rinehardt appeared late for work without accounting for her tardiness.

14. Rinehardt's conduct on third shift Ward 67, along with the conduct of Rinehardt's co-workers, created a morale problem for employees assigned to the ward. Staff members who were assigned to the ward feared for their safety and the safety of patients as a result of the staff's conduct. Workers assigned to this ward felt intimidated by the Rinehardt's behavior and feared for their personal safety if they confronted Rinehardt and other Ward 67 third shift staff about their failure to comply with CMHIP policies and nursing standards.

15. Based on the information Drennicky gathered, she decided to meet with Rinehardt. Drennicky wanted to discuss the information she received that Rinehardt may have failed to comply with CMHIP policies and nursing practices. By letter dated October 14, 1996, Drennicky gave Rinehardt notice that a meeting would be held with her on October 22, 1996, pursuant to the provisions of Board Rule, R8-3-3. The letter advised, in pertinent part, that:

The purpose of this meeting is to discuss several issues of concern brought to my attention by some of your peers and supervisors. The issues as presented suggest your flagrant and willful misconduct, failure to comply with standards of efficient service, and performance that places the institution at risk. Some of the issues that we will discuss are: use of work time and breaks, documentation of worked time, completion of nursing standards such as patient hourly checks, and the unauthorized use of state assets for personal use.  
(Emphasis supplied.)

16. The October 22, 1996, R8-3-3 meeting was rescheduled to October 23, 1996, to accommodate Rinehardt and her attorney's schedule. On October 22, 1996, Rinehardt's attorney requested additional, more specific, information about the issues to be considered at the October 23, 1996, R8-3-3 meeting. Drennicky responded to the request for additional information in another letter dated October 22, 1996. Drennicky advised Rinehardt's attorney that the matters previously referenced would be discussed at the October 23 meeting and the following information would also be considered at their meeting. She states in her letter to the attorney:

Perhaps the following will be more helpful in your preparation for the meeting.

1. Discrepancies on Time Sheets:
2. Break times used leaving the ward in a high risk situation and on one occasion that I am aware the ward was abandoned for a short period of time.
3. Sleeping on assigned shift.
4. Patient Hourly checks not being performed
5. The unauthorized use of state property, e.g. patient food.

17. At the October 23, 1996, R8-3-3 meeting, Rinehardt presented no verbal information in response to the allegations of misconduct. She submitted an affidavit in which she denied that she had any responsibility for the wrongdoing alleged.

18. Drenwicky considered the information she gathered during her investigation into the conduct occurring on Ward 67 third shift. She received information from a variety of sources. Drenwicky found the information she received during her investigation to be more reliable than the denial of wrongdoing contained in Rinehardt's affidavit. Many of Rinehardt's co-workers had come forward to implicate themselves in the misconduct that occurred on Ward 67 third shift. Drenwicky found the employee admissions which were against their own interest to be more credible than the information she received from Rinehardt.

19. Drenwicky was aware that Rinehardt's employment record was without blemish. Despite this knowledge, Drenwicky decided to terminate Rinehardt's employment. Drenwicky concluded that Rinehardt's conduct in failing to check patients, encouraging staff not to check patients, taking extended breaks, and failing to appear for work jeopardized the safety of patients and staff on Ward 67 third shift. Drenwicky further concluded that the theft of state property in Rinehardt's conduct removing food from a locked kitchen constituted willful misconduct which could not be tolerated.

#### DISCUSSION.

Certified state employees have a protected property interest in their employment. 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).

Respondent established by preponderant evidence that Complainant engaged in the conduct for which discipline was imposed. The conduct was proven to constitute violation of R8-3-3 in that it constituted a failure to comply with standards of efficient service or competence, willful misconduct and a willful failure to perform duties assigned. The evidence further established that the conduct proven here provided adequate basis to terminate Complainant's employment. Complainant's employment record aside, the conduct proven was so egregious as to justify termination of Complainant's employment without progressive disciplinary measure being imposed first.

Complainant argues that the termination cannot be sustained for a number of reasons. First, Complainant alleges that she was not given adequate notice of the conduct to be considered at the R8-3-3 meeting such that she could appear at that meeting and meaningfully respond to the allegations. Complainant contends that the failure to give adequate notice is a denial of due process.

Based on the evidence presented at hearing, Complainant was provided adequate notice of the allegation to be considered at the R8-3-3 meeting. The evidence established that Complainant initially received notice of the R8-3-3 meeting which included information sufficiently detailed to give Complainant the opportunity to respond. Then, Complainant received additional information in response to her attorney's request. The additional information was provided to Complainant's attorney prior to the meeting.

The evidence established that Complainant appeared at the R8-3-3 meeting with her attorney who advised Drewnicky that Complainant would stand on the response she prepared in an affidavit submitted at the R8-3-3 meeting. At not time during the R8-3-3 meeting did Complainant request that the meeting stop to provide her additional time to prepare a response to the allegations of misconduct.

Complainant further contends that the discipline imposed was done without proper appointing authority. To the contrary, the evidence established that Drewnicky was verbally delegated appointing authority to impose discipline on Complainant on November 1, 1996. The evidence further established that she imposed discipline on November 18, 1996, and that the appointing authority reaffirmed the delegation of appointing authority in writing on November 26, 1996.

State Personnel Board rule, R1-4-2(A), permits an appointing authority to be delegated verbally. In this case, no evidence was presented that the appointing authority later countermanded the action taken. In fact, the evidence established that following Complainant's termination, the appointing authority reaffirmed his delegation in writing.

Complainant contends that Respondent presented no direct evidence that she engaged in the acts for which discipline was imposed. Complainant contends that Respondent's case rest on hearsay and vague recollections of witnesses of distant events. Complainant contends that Respondent cannot prevail without specific allegations of misconduct and specific proof of misconduct.

Ample evidence was presented to support the conclusion that Complainant took extended breaks, stole food from the CMHIP kitchen, failed to make patient checks, encouraged others not to make patient checks and failed to maintain accurate time records. Twelve witnesses were called by Respondent. The witnesses testified over a period of approximately four days. The witnesses included Complainant's former co-workers who specifically recalled Complainant's misconduct. The witnesses testified about their own misconduct in the process of responding to questions about Complainant's conduct. Some of these witnesses were disciplined for the misconduct which was revealed in the course of their reports about Complainant. Some co-workers came forward to complain about Complainant's conduct unsolicited. The witnesses also included supervisors to whom complaints of Complainant's conduct were reported.

The evidence established that Complainant participated with a group of employees who were running amok. They lacked concern for the patients, felt no duty to comply with the hospital policies, and created a liability for CMHIP since their actions could have resulted in serious harm or injury to patients or staff.

The evidence presented by Complainant at hearing came from her former co-workers on Ward 67 third shift. They all denied any wrongdoing. All but one of Complainant's witnesses were separated from employment under unfavorable circumstances. Complainant's witnesses were deemed to be less credible than Respondent's witnesses.

No evidence was presented at hearing from which it could be concluded that either party is entitled to attorney fees under section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B

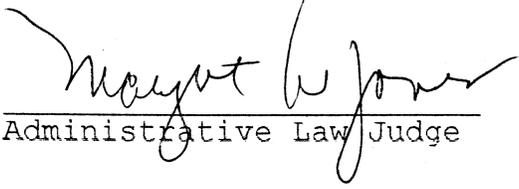
**CONCLUSIONS OF LAW**

1. Respondent established by preponderant evidence that Complainant engaged in the acts for which discipline was imposed.
2. Respondent established that the conduct proven to have occurred constituted violation of R8-3-3.
3. Respondent's decision to terminate Complainant's employment was neither arbitrary, capricious, nor contrary to rule or law.
4. Neither party is entitled to an award of attorney fees.

**ORDER**

The action of the agency is affirmed. the appeal is dismissed with prejudice.

DATED this 9 day of  
December, 1997, at  
Denver, Colorado.

  
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.

CERTIFICATE OF MAILING

This is to certify that on the 8TH day of December, 1997, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

David E. Ware  
Altman, Keilbach, Lytle, Parlapiano & Ware  
229 Colorado Avenue  
P.O. Box 333  
Pueblo, CO 81002

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

Toni Jo Gray  
Office of the Attorney General  
State Services Section  
1525 Sherman St., 5th Floor  
Denver, CO 80205

Van Fritch