

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 98 B 065

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

EDNA MARTINEZ,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,
DIVISION OF VOCATIONAL REHABILITATION,

Respondent.

THIS MATTER was heard in evidentiary hearing before Administrative Law Judge Michael S. Gallegos, on May 27, 1998 and on August 27, 1998 at 1525 Sherman Street, Room B-65, Denver, Colorado. Respondent was represented by Assistant Attorney General Stacy L. Worthington. Complainant appeared and was represented by Mr. John W. McKendree, Attorney at Law.

MATTER APPEALED

Complainant appeals a disciplinary termination of employment. For the reasons set forth below, **Respondent is affirmed.**

PREHEARING MATTERS

1. Witnesses

a. Witnesses were sequestered on the joint motion of the parties.

b. Complainant's daughter, Ms. Twilight Bingham, was allowed to remain in the hearing room for hearing over the objection of Respondent. Ms. Bingham is a paralegal. Although not employed by Complainant's counsel, she served as legal assistant/paralegal to Complainant's counsel in preparing this case for hearing. Ms. Bingham was also present at the R833 meeting held in this matter. Therefore, Respondent argued, Ms. Bingham was a potential rebuttal witness for Respondent. However, Ms. Bingham was not endorsed as a witness by either party and Complainant's counsel was clear that he did not intend to call Ms. Bingham on behalf of Complainant. Respondent's objection was overruled.

c. Respondent called the following witnesses in support of its' case: Ms. Edna Martinez, the Complainant; Mr. Larry Gauthier, Program Supervisor I, Colorado Division of Vocational Rehabilitation; and Dr. Kenneth Schmidt, Director of Field Services for the Colorado Department of Human Services, Division of Vocational Rehabilitation and the appointing authority in this matter.

d. Complainant testified on her own behalf

2. Exhibits

- a. The parties stipulated to the admission into evidence of Respondent's Exhibits I through 10. Respondent's Exhibit 14 was accepted into evidence without objection.
 - b. By testimony, it was determined that the words unintentionally left off the bottom of Respondent's Exhibit 6 are "my ability".
 - c. Respondent's Exhibits 11, 12 and 13 were accepted into evidence over the objection of Complainant as to relevancy. The objection was overruled because Exhibits 11, 12 and 13 are *Complainant*'s documentation of events which the appointing authority considered in making his decision to terminate.
 - d. Complainant's Exhibits M, Q, U-1 through U-3, U-6, and U-8 through U-1 8 were accepted into evidence without objection.
 - e. Complainant's Exhibit W - 2 was accepted by stipulation and provided for the record after the conclusion of hearing in this matter.
- 3. Confidentiality** - For reasons of client confidentiality all clients were referred to only by their initials. Client names were redacted from exhibits.

ISSUES

1. Whether Complainant committed the act(s) which gave rise to the disciplinary termination.
2. Whether Complainant's action's action(s) warranted termination.
3. Whether Respondent's action(s) were arbitrary, capricious or contrary to rule or law.
4. Whether Complainant is entitled to costs including attorney's fees.

FINDINGS OF FACT

1. Complainant was a Rehabilitation Counselor for the Colorado Division of Vocational Rehabilitation (DVR). At the time of her termination she had more than ten years experience in rehabilitation counseling. Complainant received her Master's degree in Rehabilitation Counseling, with an emphasis in Drug and Alcohol (D & A) counseling, from the University of Northern Colorado (UNC) in 1986.
2. Complainant worked, while at UNC, at a half-way house for youthful offenders and volunteered for various non-profit organizations. She began her career counseling seasonal "farm workers". Immediately prior to beginning work with the Colorado Division of Vocational Rehabilitation, Complainant worked for Catholic Community Services in Greeley, Colorado.
3. Complainant started with DVR as a Counselor Aid in Colorado Springs. She received training from the State of Colorado on the Rehabilitation Counselor Code of Ethics in the early 1990's and served on a committee which reviewed state regulations including confidentiality regulations.
4. In 1993 Complainant moved to a rehabilitation counselor position at the West Denver office of the Division of Vocational Rehabilitation. In 1997 Complainant took a "verbal judo" class the objective of which was to increase her communication skills with "difficult people".
5. While with the Division of Vocational Rehabilitation, Complainant received no training regarding the meaning of "confidentiality" or her obligation to maintain confidentiality, neither did she receive training in conflict management or anger management.
6. Complainant's immediate supervisor told Complainant to keep client information confidential unless she got a release from the client. He also requested that she read the (counselor's) manual regarding confidentiality.
7. Complainant's immediate supervisor was Mr. Larry Gauthier, Program Supervisor I. Mr. Gauthier supervised approximately 15 (fifteen) people including 7 (seven) counselors. Mr. Gauthier's supervisor was Ms. Marilyn Carmichael.
8. The majority of Complainant's clients were on probation, on parole or with some type of connection to the Colorado (State) correctional system. Almost all DVR rehabilitation counselors had some clients with criminal or correctional issues. However, Complainant had a disproportionately high number of clients from corrections.
9. Complainant counseled people with medical and/or mental disabilities. Her job included meeting with the client/applicant, taking the application for services, gathering medical information and referrals to mental health counselors, if necessary,

i.e. a rehabilitation counselor helped clients identify their limitations and either overcome them or learn to live with the limitation(s). Her main objective was to help them find employment.

10. One of Complainant's clients complained to Mr. Gauthier that Complainant told her (the client) that she did not make good choices and therefore *Complainant* would make the decisions and act like the client's mother. The client reported that Complainant required the client to give Complainant a hug before and after each meeting.

11. A rehabilitation counselor's goal should be to allow the client to make informed choices. However, the counselor must also consider the client's aptitude, capabilities, resources, etc. Where necessary, decisions should be made jointly between counselor and client.

12. Following this complaint (paragraph 10), Mr. Gauthier spoke to Complainant about the need to be careful, professional and objective.

13. Mr. Gauthier's process for handling complaints was: a) talk about the complaint with the employee and provide supervision in a effort to correct the behavior, b) if the behavior continues, make written documentation of the behavior, followed by a written warning if the behavior does not change, c) issue a corrective action.

14. On one occasion, in 1994, Mr. Gauthier apologized to Complainant for his handling of a client's request for transfer. (Complainant's Exhibit Q.)

15. Complainant does not remember speaking with Mr. Gauthier about complaints against her. She was surprised by the (written) corrective actions he issued to her. She does not remember speaking with Mr. Gauthier about the corrective actions.

16. In the last three years before Complainant's termination (November 1994 through November 1997), there were numerous complaints, from clients and service providers, regarding Complainant's lack of confidentiality and lack of courtesy/civility. During the same time period thirteen (13) clients asked to be transferred from Complainant to another counselor, an average of four (4) per year.

17. The average number of clients who asked to be transferred during the same period (November 1994 through November 1997) was three (3) per counselor per year. The average number of complaints per counselor per year during the same time period was between 3 (three) and 4 (four). Some counselors received no complaints.

18. Complainant's P.A.C.E. (Performance Appraisal for Colorado Employees) evaluation for the period July 1, 1994 through June 30, 1995 rated her "Interpersonal Relations" as "Commendable".

19. Complainant's evaluation for July 7, 1995 to June 30, 1996 indicated that her "interpersonal and communications skills need to improve through training..."

20. On August 30, 1996 Complainant received a corrective action. (Respondent's Exhibit 4.) Complainant did not grieve the corrective action because she was afraid that Mr. Gauthier would take her job away from her.

21. Complainant's August 30, 1996 corrective action was based on a communication problem that began in February, 1996 between Complainant and the Counseling, Evaluation and Treatment Program, Inc. (CETP), a service provider. Complainant believed that CETP was double billing for their services, i.e. CETP billed the Division of Vocational Rehabilitation (DVR) and billed the client individually. In July or August of 1996 Ms. Judy Vaughn from CETP advised Mr. Gauthier, Complainant's supervisor, that at least two of CETP's consumers (DVR clients) had advised her (Ms. Vaughn) that Complainant would not authorize treatment at CETP.

22. Mr. Gauthier agreed that there were billing problems with CETP. Consequently, a billing procedure was instituted in February, 1996. Nonetheless, Complainant's comments to clients were in violation of DVR policies and procedures which allow eligible consumers (clients) the "right to choose among those available choices". Additionally, Mr. Gauthier felt that Complainant's comments to clients (paragraph 21 above) were unprofessional and disrespectful. (Respondent's Exhibit 4.)

23. Mr. Gauthier did not interview the two clients who advised Ms. Vaughn regarding Complainant's statements.

24. Ms. Marilyn Carmichael, Mr. Gauthier's supervisor, also reviewed the Vaughn/CETP (paragraph 21 and 22 above) incident and found deficiencies in Complainant's handling of the cases and the clients in question.

25. The August 30, 1996 corrective action directed Complainant to review applicable policy and procedures, increase the accuracy of her interpretation of DVR policy and procedures, complete a customer service training and "treat others with respect in an objective and professional manner." (Respondent's Exhibit 4.)

26. Complainant felt that her supervisor, Mr. Gauthier, commented that she didn't treat people with respect "every time I turned around".

27. One of Complainant's children, an adult daughter, died in May, 1996 after an extended battle with cancer. Complainant was off work, attending to her daughter, grieving and the funeral arrangements for the months of March, April and May, 1996.

28. After Complainant returned to work she felt that Mr. Gauthier's comments,

about lack of respect for others, increased. She felt that Mr. Gauthier would often “chew me out” (verbally reprimand her).

29. Between August, 1996 and September, 1997 (a one year period of time) seven (7) clients asked to be transferred from Complainant to another counselor. Their transfer dates were October 6, 11 and 16, 1996; February 27, 1997; July 10 and 25, 1997 and one (J.S.) in September, 1997. (See also paragraph 16 above.)

30. Mr. Gauthier felt that the number of requests for transfer to another counselor other than Complainant (seven) during the last 14 (fourteen) months that Complainant worked for DVR might be somehow related to the very emotional way in which Complainant handled the death of her daughter. Therefore, he tried to extend every option to Complainant in order to correct Complainant’s behavior including written warnings instead of corrective actions.

31. While Complainant was still under the August 30, 1996 corrective action (a period of one year), Mr. Gauthier had to transfer one of Complainant’s clients because, in spite of a difficult relationship between Complainant and the client, Complainant told the client she was going to keep her (the client’s) case so no one else would have to put up with her. The client asked Mr. Gauthier to be transferred to another counselor. Mr. Gauthier determined that Complainant’s comments to this client bordered on intimidation or harassment.

32. While Complainant was still under the August 30, 1996 corrective action, Mr. Gauthier had to transfer another client from Complainant because the client, L. J. B. reported embarrassing, hostile and racial comments made by Complainant. Complainant improperly discussed Black women raising “black boys” with this client. On another occasion, in the waiting area, Complainant refused a doctor’s note from the client as an excuse for missing training. Mr. Gauthier found that comments made by Complainant to this client in the waiting area were not only embarrassing but also a breach of confidentiality.

33. Complainant reported that her questions and comments to the client were based on a newspaper article about African-American men and family structure. Mr. Gauthier found that information from the newspaper article could have been transmitted in a fashion that did not carry racial overtones.

34. In order to be effective as a rehabilitation counselor there must be a high level of trust between counselor and client. It is critical to the success of a rehabilitation counselor that the counselor have a good “working” relationship with the client.

35. Five complaints against Complainant were investigated by Mr. Gauthier. The specific dates of the complaints were October 3 and 10, 1996; February 27, 1997; May 14, 1997 and some time in June, 1997. (The following is a brief summary of the

complaints and Complainant's response to each, if any. They are not listed in chronological order.)

- a) One of the complaints against Complainant came from Bayaud Industries, in February 1996, indicating that clients were not being treated fairly by Complainant. Complainant's response: Complainant did not agree that S.L. was being treated unfairly.
- b) One of Complainant's clients, O. McP., was 8 (eight) months late in meeting his compliance requirements. It was part of Complainant's job to follow upon clients to make sure they completed program requirements. Mr. Gauthier did not ask Complainant why the documentation was so late. Complainant states that she offered an explanation to Mr. Gauthier but he ignored it.
- c) Complainant's client, C. D., had a copy of his IWRP (Individual Written Rehabilitation Report) that was different from the copy in the file. When questioned by Mr. Gauthier, Complainant stated that the copy in the client's possession was a "draft" copy. C. D. also reported that on one occasion Complainant "hung-up on" him. Complainant states that it was C. D. who "hung-up on" her.
- d) R. R. complained that Complainant 'always argues with me'.
- e) Mr. Gauthier determined that comments made by Complainant to S. McG., about S. McG,'s dress/clothing were inappropriate.

36. Some services require financial eligibility as confirmed by the IWRP form. If services are provided without confirmation of financial eligibility federal funding of those services may be withdrawn or withheld from the Division of Vocational Rehabilitation general fund.

37. The number and type of complaints Mr. Gauthier received about Complainant caused him to seriously question Complainant's credibility.

38. In an attempt to find some way to correct Complainant's unprofessional behavior, Mr. Gauthier contacted the personnel office which suggested that he complete two corrective actions separated by issue in order to make the issues more clear and the corrective action to be taken by Complainant more clear to here.

39. On July 24th and 25th, 1997 two consecutive corrective actions were issued by Mr. Gauthier. Complainant received both corrective actions on the same date, July 25, 1996. Each corrective action indicates that Complainant had not corrected the type of behavior which gave rise to the first corrective action in 1996.

40. Complainant did not grieve the 1997 corrective actions because she was “terrified” that Mr. Gauthier would cause her to lose her job. (Respondent’s Exhibits 2 and 3.)

41. Complainant’s July 24, 1997 corrective action was based on “several common complaints” regarding Complainant’s manner of interaction with others. (See paragraph 35 above.) It directed Complainant to perform her duties “without anger, emotional intimidation, or any other form of harassment,” to review the DVR safety policy, to consider utilizing the Colorado State Employee Assistance Program or other counseling services, and to “reflect on the interpersonal and customer service skills you have been taught through the various educational and counseling programs you have attended.” Mr. Gauthier also offered to meet with Complainant regarding these issues. (Respondent’s Exhibit 2.)

42. Complainant reviewed DVR safety policy and procedures as directed by the corrective action of July 24, 1997.

43. Complainant’s July 25, 1997 corrective action was based on Mr. Gauthier’s concerns regarding “some of your actions and decisions as they relate to interpreting DVR policies. For example, you have provided substantial services without having a completed IWRP (form) and/or a financial analysis.” It directed Complainant to review specific DVR policies and attend relevant inservice training. Mr. Gauthier also offered to meet with Complainant regarding these issues. (Respondent’s Exhibit 3.)

44. Complainant reviewed DVR policies and attended one inservice training. (See paragraph 4 above.)

45. Throughout the remainder of her employment with the Division of Vocational Rehabilitation, Complainant never asked to meet with her supervisor, Mr. Gauthier, regarding the issues raised in any of the corrective actions.

46. At hearing Complainant stated that contacts, including meetings with Mr. Gauthier were “stressful”. She felt that Mr. Gauthier did not like her and was, perhaps, “trying to trap me.” Complainant stated that Mr. Gauthier “wanted to get me out of there”.

47. Complainant did not understand the point of a corrective action. She did not understand in what ways her supervisor, Mr. Gauthier, expected her to change. At hearing she stated that she tried different changes but “it was always the wrong thing.”

48. At hearing Complainant stated that throughout her difficulties with her supervisor, e.g. corrective actions through her R833 meeting and termination. “I said what I thought he wanted to hear.”

49. Within Complainant's P.A.C.E. evaluation for July 1, 1996 through June 30, 1997, Complainant's "Interpersonal Relations" were rated as "Needs Improvement". Her overall rating was "Good". (Respondent's Exhibit 1.)

50. During the months July, 1997 to October, 1997, Complainant carried a caseload of approximately 30 (thirty) clients.

51. In the Summer and Fall of 1997 Complainant had a client, J.S. Complainant attempted, in many ways, to help J.S. find employment which necessitated addressing other issues in J.S.'s life, e.g. J.S. had an IQ of 67 and suffered from arthritis. J.S. also had violence related issues and on one occasion Complainant felt that J.S. was going to strike her (Complainant).

52. There are conflicting reports as to whether J.S. simply "stood up" in an intimidating manner or J.S. waived her arms and "advanced" on Complainant in a client meeting.

53. Part of Complainant's job duties was keeping complete and accurate information on each client which included keeping "progress notes" on each client. (Respondent's Exhibits II, 12 and 13.) The procedure for keeping progress notes included: making the notes as soon as possible after meeting with the client, also known as an "applicant".

54. Some of Complainant's progress notes were not written on the date indicated in the note. (Respondent's Exhibits 11 and 13.) Some progress notes rambled.

55. Complainant states that her progress notes rambled because she tried to include everything. Complainant usually typed her progress notes at the computer (word processor) in a stream-of-consciousness fashion that presented itself as rambling or poor grammar.

56. J.S. failed to appear for a number of counseling meetings scheduled with her counselor, Complainant.

57. At a scheduled meeting time for J.S., J.S. appeared with her nephew. When it was time for Complainant and J.S. to go into the other room for their counseling meeting, J.S.'s nephew followed them into the meeting. Complainant, who was concerned about violent outbursts from J. S., did not stop him.

58. J.S. reported to Mr. Gauthier that Complainant spoke by telephone with J.S.'s daughter and during the conversation told J.S.'s daughter what J.S. "needed to do". Mr. Gauthier interpreted this as a breach of confidentiality.

59. Rule 2.8 of the Rehabilitation Counselor Code of Ethics states that a counselor must get the client's permission before allowing family involvement, i.e. any information is confidential information. (Complainant's Exhibit W-2.)

60. At J.S.'s request, Complainant did not allow J.S.'s husband into counseling meetings with J.S.

61. Progress notes on client J.S., although written on the date indicated, were inaccurate in part, e.g. Complainant stated in the progress notes that she *invited* J.S.'s nephew into the meeting with J.S. At hearing Complainant reported that she stated in her progress notes that she invited J.S.'s nephew into the meeting because she (Complainant) was trying to show her supervisor, Mr. Gauthier, that she had control over the situation/case. (Respondent's Exhibit 12.)

62. Rule 1.4 of the Rehabilitation Counselor Code of Ethics states, in pertinent part, that rehabilitation counselors "will not engage in any act or omission of a dishonest, deceitful, or fraudulent nature." (Complainant's Exhibit W-2.)

63. Complainant believes that inaccuracies in her progress notes on J.S. were due, in part, to her fear of physical harm from J.S., i.e. one of her progress notes on J.S. (Respondent's Exhibit 11) was written within minutes of a near physical encounter initiated by J.S. toward Complainant. (See paragraph above.)

64. J.S. asked to be reassigned to another counselor. Complainant's supervisor, Mr. Gauthier, investigated the request, also known as an "appeal". He then reassigned J.S., informed Complainant by written memorandum (Respondent's Exhibit 5) and later spoke with Complainant about his concerns with Complainant's handling of J.S.'s case.

65. Mr. Gauthier wrote a "memo" (report) regarding Complainant's handling of J.S.'s case to his supervisor, Ms. Carmichael, for the purpose of receiving guidance on how to handle Complainant's continued behavioral issues. Mr. Gauthier felt that he had exhausted all options, including face to face instruction to Complainant, written direction, training and suggestions to Complainant that she receive some type of counseling. (Respondent's Exhibit 5.)

66. Each transfer request/"appeal" was copied and forwarded to Mr. Gauthier's supervisor, Ms. Carmichael and to her supervisor, Dr. Kenneth Schmidt.

67. Mr. Gauthier also completed an interim "Performance Progress Review" on Complainant for the period July 1, 1997 through September 30, 1997 in which he addressed issues raised by J.S. Mr. Gauthier did not discuss the issues contained in the interim review with Complainant prior to presenting it to Complainant. Complainant wrote, at the bottom of the review: "I do not agree that I broke any rules. I tried to help

her to the best of my ability.” (Respondent’s Exhibit 6.)

68. Mr. Gauthier was aware that Complainant maintained some issues involving her daughter’s death.

69. Complainant did not receive counseling through the Colorado State Employees Assistance Program. However, she was seeing a private therapist.

70. Mr. Gauthier contacted the Colorado State Employees Assistance Program (CSEAP) and spoke with a counselor, Mr. Ed Kraft, regarding his growing concerns about how to handle the situation with Complainant. Through speaking with the CSEAP counselor, Mr. Gauthier determined that transferring Complainant to another area was not an option available to him.

71. Mr. Gauthier did not get authorization from Complainant to divulge confidential information to the CSEAP counselor.

72. Mr. Gauthier spoke with Dr. Schmidt regarding his concerns about Complainant’s behavior.

73. In deciding to hold an R833 meeting in this matter, Dr. Schmidt considered concerns expressed by Mr. Gauthier, the fact that Complainant had previous corrective actions for similar behavior, a memo on J.S. written by Mr. Gauthier for Ms. Carmichael (Respondent’s Exhibit 5) and two memos written by Ms. Carmichael suggesting an R833 meeting be held.

74. Complainant disputes some of the information contained in Ms. Carmichael’s memos to Dr. Schmidt. (Respondent’s Exhibits 7 and 8.)

75. An R833 meeting was scheduled for October 21, 1997 (Respondent’s Exhibit 9) but postponed to accommodate representation for Complainant. The R833 meeting was held on October 31, 1997. Complainant was represented by Mr. Fatter, Attorney-at-Law.

76. As a result of the R833 meeting, Dr. Schmidt determined that Complainant “had not totally grasped the changes” in rehabilitation law (e.g. the federal Rehabilitation Act of 1992) and rehabilitation services, i.e. the subtleties of approach in working with clients, e.g. involving the client, encouraging client input and participation, allowing the client to make “informed choices”. The rehabilitation counselor’s role, since 1992, is to “orchestrate” services and decisions.

77. In making his decision to discipline Complainant the appointing authority, Dr. Schmidt, considered the statements made at the R833 meeting, the fact that Complainant had previous corrective actions for similar behavior, the facts which gave

rise to those corrective actions, a memo on J.S. written by Mr. Gauthier for Ms. Carmichael (Respondent's Exhibit 5), specific client case records and documentation. He considered mitigating factors from all sources including the effect of Complainant's daughter's death on Complainant. He noted that Complainant's supervisor had been "working with her for quite some time."

78. It is Dr. Schmidt's practice to allow two or three days administrative leave to an employee, after an R833 meeting, in order to allow that employee to prepare additional written responses or information regarding the issues addressed in the R833 meeting. Administrative leave was granted to Complainant after the R833 meeting in this matter.

79. Dr. Schmidt, the appointing authority in this matter, considered a written statement submitted by Complainant.

80. Complainant was on Family Medical Leave (FMLA) from early November to November 24, 1997.

81. Complainant had a medical release to return to work on November 25, 1997.

82. On November 25, 1997, the date Complainant returned to work, she met with Dr. Schmidt and Ms. Carmichael. She was presented with a termination letter advising her that her employment would be terminated effective the end of the month. (Respondent's Exhibit 10.)

83. In making his decision to terminate Complainant's employment, the appointing authority considered the following:

- a) At the R833 meeting Complainant admitted breaking the rules (violating the Rehabilitation Counselor's Code of Ethics) but stated that she did so because she thought it would help to keep her job.
- b) Complainant's daughter, Ms. Bingham, appeared at the R833 meeting and indicated that she had some knowledge of the facts of the J.S. case. Communication of the facts J.S.'s case by Complainant to her daughter is a breach of confidentiality.
- c) Complainant divulged confidential information about client J.S. to J.S.'s nephew by allowing him into a meeting with J.S. and stated, at the R833 meeting, that she did not think it was improper to do so.

84. The appointing authority determined that Complainant's actions were willful misconduct, i.e. that she had the ability to make the appropriate and necessary changes

but was not willing to make the changes.

85. In making his decision to terminate Complainant's employment, the appointing authority also considered the number and type of complaints against Complainant by clients and service providers, the number and underlying reasons expressed for requests for transfer and what appeared to be a pattern and practice of behavior by Complainant. He also considered the concepts of progressive discipline, Complainant's 9 (nine) year career. that she was a hard working individual who believed strongly in her work

86. Complainant did not explain to her supervisor, at the R833 meeting or at any time, that the reason her progress notes on J.S. were inaccurate was because she was trying to show him (her supervisor, Mr. Gauthier) that she was in control of the situation/case.

87. Complainant stated that while she did speak with her daughter about J.S.'s case, she did not tell her daughter "anything personal" about J.S., i.e. the information was shared in preparation for the R833 meeting and therefore was not a breach of confidentiality.

88. Complainant points out that during the R833 meeting Dr. Schmidt did not ask Complainant's daughter. Ms Bingham, to leave while he discussed J.S. 's case even though he used J.S.'s full name. Complainant asks if that is not also a breach of confidentiality.

89. The appointing authority did not refer to any breach of client confidentiality to Complainant's daughter in his termination letter.

90. Division Rule 102.1 states that confidentiality applies to "any information" regarding applicants (clients) and may not be breached.

91. Rule 6.3 of the Rehabilitation Counselor Code of Ethics prohibits communication of confidential information without written permission of the client.

92. In making his decision to terminate Complainant's employment, the appointing authority specifically did not consider the facts of the Vaughn/CETP incident (paragraphs 19 through 23, above). He did not consider that two corrective actions were given to Complainant on the same day (paragraph 29 above) and he did not consider that the majority of Complainant's clients were involved with the corrections system.

93. Complainant did not offer and the appointing authority did not consider any of Complainant's awards and accomplishments. (Complainant's Exhibits V-1 through U-3, U-6, and U-8 through U-18.)

94. The appointing authority considered the full range of discipline available to him, including a pay reduction, demotion and suspension. He felt that a pay reduction would not have the desired effect of changing Complainant's behavior. There were no options for demotion. He also considered transfer as an alternative to termination but determined that a transfer would not serve the needs of the clients.

DISCUSSION

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

Respondent argues that it has met its burden of proof as to 1) whether the acts or omissions occurred and 2) whether just cause warrants the discipline imposed in this matter. Complainant does not deny that most of the alleged acts and omissions occurred. Rather her argument appears to be that she had good reasons or just cause for the actions or omissions. Complainant also blames her supervisor, Mr. Gauthier, for her misinterpretations of confidentiality rules and her inability to understand what she was doing wrong.

Complainant's intentions were kind-hearted, e.g. to help her clients make the right decisions for the right reasons. (See paragraph 9 above.) However, Complainant's manner, as determined by the facts of this case and her demeanor on the stand, did not instill trust in the clients that she knew what she was doing. On the stand, Complainant appeared forgetful and emotional. It is the opinion of this administrative law judge that her daughter's death in 1996 did have significant and far-reaching effects on Complainant's emotional stability and therefore on her ability to perform her duties as a rehabilitation counselor.

Complainant often made inappropriate comments (See paragraphs 21 and 22, 31 and 32, 35 e), 57 and 58 above.) She discussed confidential information about client J.S. in front of or with family member without receiving written permission to do so. Perhaps more significantly she later filed a false report (progress notes) about the J.S. incident. She stated in the report that she had invited J.S.'s nephew into a client meeting, when in reality he just followed them in and Complainant, due to her own fear of J.S., did not stop him. (See paragraphs 51 through 65 above.) The reason she offered for misstating the facts is that she wanted to show her supervisor that she was in control of the case. Complainant intentionally misstated facts of a client's case to make herself look better.

Complainant states that throughout her employment relationship with her

supervisor. Mr. Gauthier she consistently told him what she thought he wanted to hear. (See paragraph 48 above.) On the other hand, believing that Complainant's difficulties were due, in part, to her daughter's untimely death, Mr. Gauthier spent considerable energy trying to communicate to Complainant what she was doing wrong and how to correct it. Complainant was trying to avoid Mr. Gauthier (paragraph 46 above) rather than seeking his advice as suggested in both of Complainant's 1997 corrective actions.

Complainant did not understand the reasons for or point of the corrective actions issued to her. (See paragraph 47 above.) She could not correct problems that she did not understand to exist. Nonetheless, when the complaints against Complainant became so numerous (paragraphs 2 1, 31, 32, 35 and 51 through 65 above) as to cause Mr. Gauthier concerns regarding Complainant's ability to be an effective counselor he so advised his supervisor, Ms. Carmichael.

Ms. Carmichael, advised the appointing authority, Dr. Schmidt by memo suggesting an R833 meeting (Respondent's Exhibit 8). Complainant argues that some of the information contained in two memos from Ms. Carmichael to Dr. Schmidt (Respondent's Exhibits 7 and 8) is not accurate. However, Dr. Schmidt relied on the memos only to determine if an R833 meeting should be set. He did not rely on the memos to determine if discipline should be imposed and, if so, what form the discipline should take.

In making his decision to discipline Complainant the appointing authority, Dr. Schmidt, considered the statements made at the R833 meeting, the fact that Complainant had previous corrective actions for similar behavior, the facts which gave rise to those corrective actions, a memo on J.S. written by Mr. Gauthier for Ms. Carmichael (Respondent's Exhibit 5, specific client case records and documentation. He considered mitigating factors from all sources including the effect of Complainant's daughter's death on Complainant. He noted that Complainant's supervisor had been "working with her for quite some time." The appointing authority did not consider any of Complainant's awards and accomplishments (Complainant's Exhibits V-I through U-3, U-6, and U-8 through U-18) because they were not available to him for consideration.

In making his decision to terminate Complainant's employment the appointing authority considered the degree and frequency of Complainant's improper conduct (paragraphs 83 through 91), the concepts of progressive discipline and all available alternatives (paragraph 94).

CONCLUSIONS OF LAW

1. Complainant breach client confidentiality on at least one occasion involving client J.S. and made inappropriate comments to other clients. She did not respond to attempts to help her correct her behavior.

2. Complainant either did not want to or could not change her behavior to the degree necessary for her to adequately complete her job duties. Therefore, termination was a reasonable alternative available to the appointing authority in this matter.
3. In deciding to hold an R833 meeting in this matter, deciding to discipline Complainant and deciding to terminate her employment, the appointing authority did not act arbitrarily, capriciously or contrary to rule or law.
4. Complainant is not entitled to costs including attorneys fees.

ORDER

The actions of Respondent are **affirmed**.

Dated this 13th day
of October, 1998
at Denver, Colorado

Michael S. Gallegos
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15). 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record must make arrangements with a disinterested recognized transcriber to prepare the transcript. The party should advise the transcriber to contact the Board office to obtain the hearing tapes. In order to

be certified as part of the record on appeal the original transcript must be submitted to the Board within 45 days of the date of the notice of appeal is filed. It is the responsibility of the party requesting a transcript to ensure that any transcript is timely filed. if you have any questions or desire any further information contact the State Personnel Board office at (303) 866-3244.

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 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 tiled with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF HAND DELIVERY

This is to certify that on the ____ day of October. 1998, I hand delivered true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE addressed as follows:

Mr. John W. McKendree
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Denver, CO 80203

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