

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 98 B 149 C

AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LEONARD MARTINEZ,

Complainant,

v.

DEPARTMENT OF HUMAN SERVICES,
WHEATRIDGE REGIONAL CENTER,

Respondent.

The Initial Decision of the Administrative Law Judge (“Initial Decision”), issued on October 19, 1998, did not address the issue of diabetes as a disability. This Amended Initial Decision contains an added paragraph addressing such issue and in all other ways is identical to the Initial Decision. The added paragraph is italicized.

THIS MATTER was heard in evidentiary hearing before Administrative Law Judge Michael Gallegos on September 9, 1998 at 1525 Sherman Street, B-65, Denver, Colorado. Respondent was represented by Assistant Attorney General, Laurie Rottersman. Complainant appeared and was represented by Elizabeth Salkind, Attorney at Law.

MATTER APPEALED

Complainant appeals two disciplinary actions imposed for sleeping on the job. The first disciplinary action, April 29, 1988 imposed a one step pay reduction for a period of six months. The second disciplinary action, July 15, 1998, was a disciplinary termination. For the reasons set forth below, **Respondent is affirmed.**

PRELIMINARY MATTERS

1. Exhibits

The parties stipulated to Complainant's Exhibit A (the transcript of deposition of Jonathan L. Gordon, M.D.) and to Complainant's Exhibit B (a doctor's note). Complainant's Exhibit A has three Exhibits attached to it, Exhibit A, B and C which were all stipulated as part of Complainant's Exhibit A.

Respondent's Exhibit 1 was accepted into evidence, over the objection of Complainant, as a document on which the appointing authority relied in deciding to hold an R833 meeting in the first matter appealed.

Respondent's Exhibits 3, 11, 12, 19 and 20 were accepted into evidence without objection from Complainant.

Respondent's Exhibits 4, 18, 21 and 23 were accepted into evidence by stipulation of the parties.

A drawing of the "downstairs living area", created during testimony by witness Whitmore, was used for illustrative purposes only and, therefore, was neither offered nor accepted into evidence.

2. Witnesses

Respondent called the following witnesses: Ms. Christine Whitmore, a licensed psychiatric technician (LPT); Mr. Bill Pola, a licensed psychiatric technician (LPT); Mr. Joe Fiorini, a licensed psychiatric technician (LPT); Ms. Marybeth Thompson, Residential Coordinator for the Depew House, and two other residential facilities within Wheatridge Regional Center; Mr. George Kemper, Director of the Wheatridge Regional Center and appointing authority in this matter.

Complainant called no witnesses but relied on the deposition testimony of Jonathan L. Gordon, M.D. (Complainant's Exhibit A).

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;

2. Whether the actions of Complainant had medical causes outside the control of Complainant, i.e. Whether the actions of Complainant warranted the disciplinary action imposed;
3. Whether Respondent's actions were arbitrary, capricious or contrary to rule or law;
4. Whether Complainant is entitled to costs including attorneys fees.

FINDINGS OF FACT

1. Complainant worked for the State of Colorado for 27 years. At the time of termination of his employment with the state he was a Developmental Disabilities Technician I working for Wheatridge Regional Center.

2. In April 1998 Complainant was assigned, one day per week, to the Miller Court and permanently (the remainder of his work week) to the Depew House, group homes which house up to six high functioning, behaviorally challenged, developmentally disabled male adults. Complainant worked the second shift from 2:00 p.m. to 10:00 p.m. or from 3:00 p.m. to 11:00 p.m. Miller Court and the Depew House are part of the Wheatridge Regional Center.

3. The developmentally disabled men who live at Miller Court and in the Depew House require 24 (twenty-four) hour supervision due to various mental disabilities including, brain damage, bipolar disorder, autism, seizure disorder and manic episodes. Some residents can become violent or can wander away from the facility/house. Violent behavior is sometimes directed at themselves (e.g. one resident bangs his head on things), sometimes at other residents (e.g. biting) and sometimes at the staff, physically attacking staff members. In any one of these situations a second staff member may need to intervene or call for assistance. Additionally, some of the men are physically large and require assistance with hygiene, meals, medications and jobs. Therefore Wheatridge Regional Center staffing ratios require one staff person for every three residents during waking hours and one staff person for the household, up to six residents, during the night shift.

4. In April and May of 1998, the residents of Miller Court and Depew House usually had training away from the residence in the mornings and in-house training in the afternoons. Training continued informally throughout the evening.

5. Ms. Christine Whitmore is a licensed psychiatric technician (LPT) who worked with Complainant on only one occasion, April 13, 1998 at Miller Court.

6. After the evening meal on April 13, 1998, Ms. Whitmore supervised kitchen clean-up and Complainant went to the "downstairs living area" with one of the residents, took off his

shoes and went to sleep. The resident went to his room.

7. After the evening meal on April 13, 1998, one of Miller Court's resident's mother brought twelve-packs of soda pop for her son. Between 5:00 and 5:30 p.m. Ms. Whitmore took the soda-pop downstairs, walked through the downstairs living area, to the garage to store the soda-pop. She observed Complainant lying on the downstairs sofa with the television on. Complainant did not move or say anything. Complainant appeared to be sleeping.

8. Later that evening Ms. Whitmore went downstairs again, this time to take clothes out of the dryer which is in a small alcove off the downstairs living area. Complainant did not move or say anything. He appeared to be sleeping.

9. Ms. Whitmore observed Complainant come back upstairs shortly before 7:00 p.m. that evening. Upon coming upstairs Complainant asked Ms. Whitmore if everything had been "OK" while he was downstairs.

10. Complainant did not advise Ms. Whitmore that he had been asleep or was ill or that he needed a substitute.

11. Miller Court residents watched All-Star wrestling on television beginning at about 7:00 p.m.

12. Proper procedure for taking sick time, after beginning a shift at Miller Court, is to call the staffing supervisor and request a substitute.

13. On April 14, 1998 Ms. Whitmore reported the incident by memorandum to Ms. Marybeth Thompson the Residential Coordinator. (Respondent's Exhibit 1.)

14. After reviewing the memorandum, Mr. George Kemper, Director of the Wheatridge Regional Center and appointing authority in this matter, determined that such action was grounds for administrative suspension and called a R833 meeting to look into the allegations.

15. At the R833 meeting Complainant stated that, on the evening of April 13, 1998, he did not want to watch All-Star Wrestling with the residents upstairs. So he went downstairs to watch television. Although he was downstairs for between 1 (one) and 1 ½ (one and one half) hours, he did not sleep. (Respondent's Exhibit 3.)

16. At the R833 meeting, Complainant did not offer any medical reasons for sleeping. Rather he denied that he had slept at all on the evening of April 13, 1998. (Respondent's Exhibit 3.)

17. As a result of the R833 meeting regarding the April 13, 1998 incident, Mr. Kemper, the appointing authority, imposed a 1 (one) step pay reduction for a period of 6 (six) months. (Respondent's Exhibit 4.)

18. Mr. Bill Pola, a licensed psychiatric technician (LPT), worked with Complainant at the Depew House for approximately one (1) year.

19. On May 3, 1998, Complainant and Mr. Pola were assigned to the second shift, from 3:00 to 11:00 p.m. After the evening meal, at approximately 4:40 p.m., Complainant stated "It's time to sleep on the job." He then went to the front livingroom, removed his shoes, reclined in a reclining chair and went to sleep. About ten (10) minutes later, Complainant started to snore. His eyes were closed and he appeared to be sleeping.

20. After the evening meal in a residential facility the staff (technicians) usually work with the residents to clean the kitchen, do the dishes, etc. Also after the evening meal residents usually have tasks to complete and staff must administer medications to some of the residents.

21. Mr. Pola telephoned the residential coordinator for Depew House, Ms. Marybeth Thompson and reported that Complainant appeared to be asleep on the job.

22. Ms. Thompson called Mr. Joe Fiorini, a licensed psychiatric technician (LPT) and a staff member of another residential facility, and asked him to go to Depew House immediately.

23. Mr. Fiorini arrived at Depew House at approximately 5:00 p.m.

24. When Mr. Fiorini arrived at Depew House, Mr. Pola asked him to "take a look" at Complainant. It appeared to Mr. Fiorini that Complainant was sleeping.

25. Ms. Thompson, the residential coordinator, arrived at Depew House at approximately 5:35 p.m. She observed Complainant sleeping in the recliner and asked Mr. Pola and Mr. Fiorini to accompany her to awaken Complainant.

26. Mr. Fiorini accompanied Ms. Thompson to awaken Complainant.

27. Ms. Thompson gently shook Complainant and asked, "Can you wake up? I need you to wake up".

28. Complainant woke up but did not say anything.

29. Ms. Thompson asked Complainant if there was anything he needed. He said "No". Ms. Thompson told Complainant that he would have to leave.

30. Complainant started to put on his shoes. Ms. Thompson advised him that they were on the wrong feet. Complainant then put his shoes on correctly.

31. Ms. Thompson asked Complainant if he needed a ride home. He refused her offer.

32. Mr. Pola, Mr. Fiorini and Ms. Thompson each filed written statements about the incident.

33. After reviewing the three written statements, Mr. Kemper, Director of the Wheatridge Regional Center and appointing authority in this matter, determined that such action was grounds for discipline and called a R833 meeting to look into the allegations.

34. Mr. Kemper placed Complainant on administrative suspension until the allegations could be investigated and the matter resolved.

35. A second R833 meeting was commenced on May 7, 1998 to address the May 3, 1998 sleeping incident.

36. At the second R833 meeting, Complainant stated that he had a diabetic condition which he did not fully understand, that a combination of high blood sugar (after dinner) and waning medication at the end of the day caused him to become drowsy. He stated that he took off his shoes due to problems with his feet. Complainant stated that he was only joking when he said "It's time to go sleep on the job." He was represented by counsel, who offered a Doctor's note (Complainant's Exhibit B) indicating that Complainant was being treated for Post Prandial Syncope.

37. Post Prandial Syncope is "blacking out" or "loss of consciousness" after eating. Post Prandial Fatigue is simply feeling tired or falling asleep after eating. Neither is necessarily related to diabetes. (Complainant's Exhibit A, pages 30-31.)

38. At the second R833 meeting Complainant's counsel requested a stay of proceedings in the matter pending the release/obtaining of medical records regarding possible alternate causes for Complainant sleeping on the job. This was granted by the appointing authority, Mr. Kemper.

39. After the first part of the second R833 meeting, Complainant was removed from administrative suspension and placed on sick leave and annual leave until the R833 meeting was reconvened. (Respondent's Exhibit 11.)

40. In January 1998 Complainant was diagnosed as having "non-insulin dependant diabetes mellitus" (Complainant's Exhibit A, page 17). Complainant had this diabetic condition on May 3, 1998. On May 6, 1998 Complainant was diagnosed as suffering from "postprandial fatigue" (Complainant's Exhibit A, page 27). Foot care issues are typical symptoms of a diabetic condition.

41. Prior to the incident's at issue in this matter, Complainant's physician, Dr. Jonathan L. Gordon advised Complainant that he should monitor his calorie intake on a daily basis, decrease his alcohol intake, watch his weight, start an exercise regimen, stop smoking and see a nutritionist. (Complainant's Exhibit A, pages 19 and 52). Complainant was placed on medication, "glyburide" to help control his blood sugars, which he took twice a day. (Complainant's Exhibit A, page 18.)

42. On June 11, 1998, at Complainant's request, Dr. Gordon completed a "State of Colorado Medical Release Form" indicating that Complainant suffered from "postprandial fatigue secondary to poor diabetes control". Dr. Gordon wrote in, on the form, "No change in work

schedule.” (Complainant’s Exhibit A, pages 39-40 and as part of Exhibit B attached to Complainant’s Exhibit A).

43. On June 18, 1998 Dr. Gordon stated that he was treating Complainant for “Post Prandial Fatigue, lightheadedness and somnolence.” (Complainant’s Exhibit A, first page of Exhibit C attached to Complainant’s Exhibit A). Somnolence is “sleepiness”. (Complainant’s Exhibit A, page 44.)

44. As of June 24, 1998, Complainant had begun no regular exercise program nor had he seen a nutritionist. (Complainant’s Exhibit A, page 52.) Complainant had been advised to decrease his calorie intake. However, “his blood sugars were consistently not being controlled.” (Complainant’s Exhibit A, page 51.) Nonetheless, on June 24, 1998 Dr. Gordon concluded that Complainant could work an 8 (eight) hour shift. (See Wheat ridge Regional Center, Physical Capabilities Evaluation form attached, as part of Exhibit B, to Complainant’s Exhibit A.)

45. Dr. Gordon increased Complainant’s medication and added evening medication (Complainant’s Exhibit A, page 51) in order to help control Complainant’s blood sugar levels and to avoid post prandial fatigue and/ or somnolence.

46. Complainant had the ability to better control his blood sugar levels, and therefore his postprandial fatigue and/or somnolence, by limiting what and how much he ate, i.e. limiting his calorie intake, and participating in regular exercise program.

47. The second R833 meeting was reconvened on July 13, 1998. The appointing authority was presented with copies of Complainant’s medical records which he reviewed and considered in making his decision. (Respondent’s Exhibit 18.) The appointing authority notes, however, that no diagnosis, prognosis or any assessment of any type was contained in the copies of Complainant’s medical files given to him for his consideration.

48. In making his decision to discipline Complainant, the appointing authority considered Complainant’s medical records, statements made at the second R833 meeting (Respondent’s Exhibit 19), statements made at the first R833 meeting (regarding the April 13, 1998 incident/Respondent’s Exhibit 3), the reports of coworkers on both incidents (Respondent’s Exhibit 21.) and Complainant’s work history and prior disciplinary actions.

49. In 27 (twenty-seven) years with the Department of Human Services, Complainant was never disciplined for sleeping on the job until April 1998.

50. The appointing authority also considered the following in determining that Complainant’s acts were wilful and in deciding to terminate Complainant’s employment:

- In both the Miller Court and Depew House incidents, Complainant made no attempt to communicate his physical condition or concerns to other staff members or to request a

substitute before or after sleeping on the job.

- At the first R833 meeting Complainant did not raise concerns about any physical condition which might cause him to “black out” or “pass out”. Rather he denied that he slept (was out) at all.
- In both incidents, Complainant removed his shoes prior to laying down or reclining which is not consistent with “blacking out” or “passing out”.
- Complainant stated to a co-worker, immediately prior to sleeping on the job, “It’s time to go sleep on the job.”

51. Termination of employment was within the alternatives properly available to Respondent.

DISCUSSION

In a disciplinary action the burden is upon 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 met its burden both with regard to 1.) whether or not the act or omission occurred and 2.) whether just cause warrants the discipline imposed. In this case Complainant first denied having fallen asleep on the job (the April 13, 1998 incident) then later in his second R833 meeting (for the May 3, 1998 sleeping incident) indicated that he may have “blacked out” due to high blood sugars and low medication levels after the evening meal, i.e. Complainant’s argument is not that the acts did not occur but that his sleeping on the job had medical causes. The acts occurred. Complainant slept on the job. The issue in this case is whether the actions of Complainant had medical causes outside the control of Complainant, i.e. whether just cause warrants the discipline imposed.

1. Arbitrary and capricious

Arbitrary and capricious can arise in one (or more) of three ways: a) by neglecting or refusing to procure evidence; b) by failing to give candid consideration to the evidence; and c) by exercising discretion based on evidence in such a way that reasonable people must reach a contrary

conclusion. *Van de Vegt v. Board of Commissioners*, 55 P.2d 703, 705 (Colo.1936).

In this case the appointing authority considered the possibility that Complainant's sleeping on the job was caused by symptoms of diabetes. He recessed the second R833 meeting in order to allow Complainant additional time to contact his physician and to research alternate causes for his

sleeping on the job, even though Complainant had not raised the diabetes issues at the first R833 meeting, i.e. he considered the possibility that Complainant had no knowledge of his medical condition at the time of the first incident on April 13, 1998. Mr. Kemper, the appointing authority read and reviewed all the medical documents, including letters from Complainant's physician, made available to him.

After reviewing all the medical information made available to him Mr. Kemper was still disturbed by a number of facts: 1) In both incidents, Complainant removed his shoes prior to laying down or reclining which is not consistent with "blacking out", "loss of consciousness" or Post Prandial Syncope, a symptom, in this case, of diabetes related issues. Removing his shoes was a willful act and Mr. Kemper's experience told him that taking your shoes off at work, even if you have foot problems related to diabetes, is not a common practice. 2) Complainant stated to a co-worker, immediately prior to sleeping on the job, "It's time to go sleep on the job." Although Complainant stated that he was just joking, the fact that he did sleep on the job makes the statement evidence of willfulness. 3) In both incidents, Complainant made no attempt to communicate his physical condition or concerns to other staff members or to request a substitute before or after sleeping on the job. If he felt "dizziness", "light headedness" or Post Prandial Fatigue he should have communicated his concerns to other staff or requested a substitute for the remainder of the evening. The appointing authority's conclusion that Complainant's actions were willful is a reasonable conclusion.

2. Medical issues and just cause

Even after reviewing Dr. Gordon's deposition testimony, which confirms Complainant's diabetes and Post Prandial Fatigue, it is clear that Complainant was aware of his diabetic condition, and the necessary measures to control it, as early as January 1998. It was within Complainant's ability to control the symptoms of his diabetes, i.e. to control the Post Prandial Fatigue by limiting the amount and type of food he ate and by regular exercise, neither of which he did. Dr. Gordon indicated that Complainant should have been able to work an 8 hour shift. (*See* Wheat ridge Regional Center, Physical Capabilities Evaluation form attached, as part of Exhibit B, to Complainant's Exhibit A.) If Complainant's sleeping on the job was due to his diabetes, then his willfulness lies in his willful failure to change his life-style in order maintain a level of health necessary to perform the type of work he did.

Neither Complainant nor Respondent characterized Complainant's diabetes as a disability

and Complainant does not qualify as “disabled” based on current case law which indicates that if one is taking prescribed medication(s) and, consequently, there are no substantial limitations on his activities while medicated, he is not disabled. Murphy v. United Parcel Service, Inc., 141 F.3d 1185 (10th Cir.1998) (Unpublished Decision). (See also paragraphs 41, 42 and 44 above.)

CONCLUSIONS OF LAW

1. Complainant slept on the job on two occasions, April 13, 1998 and May 3, 1998. On those dates Complainant suffered from diabetes and Post Prandial Fatigue. Post Prandial Fatigue is a symptom of Complainant’s diabetes. It was within his control to avoid falling asleep by limiting his calorie intake at the evening meal or to call for assistance before falling asleep.
2. Respondent’s conclusion that Complainant acted willfully was a reasonable conclusion.
3. Respondent’s actions in imposing discipline in this matter were not arbitrary or capricious.
4. Respondent’s actions were not instituted frivolously, in bad faith, maliciously, or as a means of harassment nor were they otherwise groundless. Therefore Complainant is not entitled to costs including attorney’s fees.

ORDER

1. Respondent’s actions are affirmed.

Dated this 22nd
day of January 1999
at Denver, CO

Michael 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 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.

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 MAILING

This is to certify that on this _____ day of _____, 1999, I placed true copies of the foregoing **INITIAL DECISION** in the United States mail, postage prepaid, addressed as follows:

Ms. Elizabeth Salkind
Attorney at Law
1580 Logan St., Suite 310
Denver, CO 80203

and in the interoffice mail to:

Ms. Laurie Rottersman
Assistant Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203
