

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 99B024

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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TAMALA MINAMYER,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,  
REGENTS OF THE UNIVERSITY OF COLORADO,  
UNIVERSITY OF COLORADO AT BOULDER,

Respondent.

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This matter came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on November 24, 1998 and January 11, 1999. Respondent was represented by L. Louise Romero, Managing Senior Associate University Counsel. Complainant appeared and was represented by Carol M. Iten, Attorney at Law.

Respondent's witnesses were: Gerald Peter Shostak, Director of the Wardenburg Health Center; Ingrid Hagen, Staff Physician; Rebecca Carlson, Manager of the Community Health Education Center; Margaret "Peggy" Walker, R.N.; and Suzanne Husler, Nurse Administrator.

Respondent's Exhibits 1, 2, 5, 6 and 18 were stipulated into evidence. Admitted without objection were Exhibits 4, 8, 11, 12, 14, 15, 16 and 19. Exhibits 7, 9, 10 and 17 were admitted over objection. Exhibit 20 was excluded from evidence.

Since complainant's motion for a directed verdict at the close of respondent's case was granted, she did not proffer any witnesses or exhibits.

**MATTER APPEALED**

Complainant appeals the disciplinary termination of her employment. For the reasons set forth herein, respondent's action is rescinded.

99B024

## **ISSUES**

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether respondent violated the Family Medical and Leave Act;
3. Whether complainant was retaliated against;
4. Whether either party is entitled to an award of attorney fees and costs.

## **PRELIMINARY MATTERS**

Complainant's motion to compel discovery of a medical chart, with the patient's name redacted, was granted. No ruling was made with respect to the admissibility of the document.

An order was entered sequestering the witnesses except for complainant and respondent's advisory witness, Gerald Shostak.

## **STIPULATION OF FACT**

Complainant was a skilled and competent nurse.

## **FINDINGS OF FACT**

1. Tamala Minamyler, complainant, was employed as a registered nurse (RN) by the Wardenburg Student Health Center of the University of Colorado at Boulder (UCB), respondent, for about thirteen years. She had received no corrective or disciplinary actions prior to the subject action.

2. Complainant's duties were to see walk-in patients (those without an appointment) and assess the needs of the patient. She might determine that the patient needed an appointment, or she might place the patient in the urgent care area, known as the Observation Room, where the patient could lie down.

3. The decision to place a patient in the Observation Room is left to the discretion of the nurse, and it is not always necessary for the patient to be in need of urgent care. Some patients are allowed to just rest. Complainant had good technical skills and was known to use sound judgment.

4. On Monday, August 3, 1998, between 9:00 and 9:30 a.m., complainant telephoned her supervisor, Sue Husler, and said that she needed a vacation day. Husler, the Nurse Administrator and complainant's immediate supervisor, told complainant that she was in a meeting and would get back to her. The conversation did not last for more than one minute.

5. Staff physicians do not have supervisory authority over the nurses.

6. At around 2:00 p.m. on August 3, a nurse practitioner telephoned Husler to advise her that complainant was leaving and that they would need nurse coverage. The on-duty staff physician, Dr. Hagen, was upset at complainant's leaving early, believing it to be patient abandonment. Dr. Hagen went up to Husler's office to inform her that there would be no nurses on duty after 4:00. Husler agreed to fill in.

7. Husler went down to the patient area from her second floor office in the same building to talk to the nurses. One nurse had to leave to go to the airport at around 3:00. The other one needed to catch a bus at 4:00. Complainant was gone by the time Husler got there. The nurses are scheduled to work until 5:30 p.m., although the doors are locked and the clinic closed at 5:00.

8. Complainant left the clinic at around 2:30 p.m. She had told the staff physician that she had to take her daughter to the doctor for an appointment concerning her daughter's dyslexia, an appointment which she found out about shortly before calling Husler earlier in the day. The physician did not tell complainant that she could not leave because she, the physician, is not in a position to do so.

9. Husler, a registered nurse, provided nurse coverage after 4:00. She has filled in for nurses before, although she feels that her nursing skills are not current. In addition to the physician, a nurse practitioner was present. A nurse practitioner can attend to patients and make a diagnosis the same as a physician. No new patients came in. Complainant did not abandon any patients who were there.

10. Husler informed Gerald Shostak of complainant's leaving the clinic without approval because she believed that complainant's conduct could have compromised patient care. Shostak is Director of the Wardenburg Health Center.

11. There has been one other occasion under Husler's supervision when a nurse left work without permission. The nurse

was not corrected or disciplined.

12. Two days later, on August 5, a returning patient came into the clinic with a severe headache. Complainant put the patient in the Observation Room, took his vital signs and gave the patient's chart to the on-duty physician, Dr. Schlegel. When Dr. Schlegel went to the Observation Room, he found the patient unattended.

13. Angry, Dr. Schlegel left a voice mail message for Sue Husler advising her that a patient had been left unattended in the Observation Room. Husler advised Shostak of the message because the doctor sounded so upset.

14. Whether a nurse should be in the Observation Room whenever a patient is present had been, and is, the subject of discussion and consideration as a policy issue. In August 1998, no official policy was in effect. Most, but not all, staff physicians believed that a nurse should always be with a patient in the Observation Room. Dr. Schlegel was known to hold that view. There was not a clinic policy that made it mandatory at that time. Complainant was not assigned to be in the Observation Room at all times when a patient was present. Not all of the nurses stayed in the Observation Room with patients.

15. On August 13, 1998, a nurse other than complainant twice left a patient unattended in the Observation Room. Dr. Schlegel so informed Director Shostak. The nurse was not corrected or disciplined.

16. Apparently at some point between August 5 and August 10, complainant administered a hearing test to one of the clerical workers whose desk was going to be relocated and there was a question concerning her ability to hear in the proposed location. Complainant did not charge the employee for this service, and she did not perform the service pursuant to a physician's order. The employee was not a patient at the clinic. Complainant performed the service at the request of the employee.

17. In years past, the University provided free medical services to its employees. Complainant once provided a free service to her supervisor, Husler. About three or four years ago, the policy was changed to require that a fee be charged. However, some services, such as throat cultures, flu shots and taking blood pressure are still free services for employees.

18. As complainant's supervisor, Husler probably would not have taken any action regarding the hearing test because it was not

a "big deal" and did not compromise patient care. She did not witness the event. She did not bring the happening to the attention of the appointing authority.

19. Shostak, the appointing authority, held a predisciplinary meeting with complainant on August 13 to address complainant's administration of a hearing test for another employee and the incidents of August 3 and August 5. (Exhibit 2.)

20. It was significant to Shostak that complainant was not certified to administer hearing tests. Nurses are not required to be certified to administer hearing tests.

21. Shostak believed that complainant was insubordinate towards Dr. Hagen by leaving early on August 3. Dr. Hagen testified that she did not tell complainant that she could not leave. Dr. Hagen did not have the supervisory authority to tell complainant that she could not leave.

22. By letter dated August 21, 1998, the appointing authority terminated complainant's employment, finding her conduct "so serious and flagrant that I must impose immediate disciplinary action as authorized by R8-3-1(C)." He did not otherwise cite the rules of the State Personnel Board or regulations of the agency that he felt were violated. The appointing authority indicated that he was "aware that there have been prior instances of your behavior in regard to patient care or customer services in which your conduct failed to meet organizational expectations." No evidence was introduced at hearing to support this vague generalization. (Exhibit 5.)

23. Tamala Minamyer filed a timely appeal of the disciplinary action on August 31, 1998.

## DISCUSSION

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

Motions for a directed verdict present a question of law. *Grossard v. Watson*, 221 P.2d 353 (Colo. 1950). See C.R.C.P. 50(a); § 24-4-105(4), C.R.S. The evidence must be viewed in the light most favorable to the non-moving party. *Singer v. Chitwood*, 247 P.2d 905 (Colo. 1952). It is the duty of the trial court to

grant the motion when the evidence establishes that there is no issue upon which the non-moving party could prevail as a matter of law. *Montes v. Hyland Hills Park*, 849 P.2d 852 (Colo. 1992).

At the close of respondent's case-in-chief, complainant moved for a directed verdict on grounds that respondent had failed to make a showing of just cause for the immediate termination of complainant's employment and that the appointing authority failed to use progressive discipline as required. Following argument, the motion was granted.

Viewing the evidence in the light most favorable to respondent, the facts demonstrate conclusively that respondent lacked just cause for the immediate termination of complainant's employment.

Rule R8-3-1(C), 4 Code Colo. Reg. 801-1, provides<sup>1</sup>:

In the case of a certified employee, unless the conduct is so flagrant or serious that immediate disciplinary action is appropriate, corrective action shall be imposed before resorting to disciplinary action.

Rule R8-3-2, 4 Code Colo. Reg. 801-1, provides in pertinent part: "Corrective actions are intended to correct and improve an employee's job performance or behavior in a formal, systematic manner."

The appointing authority was required to impose progressive discipline. Rule R8-3-1(C). There is no evidence of record that complainant was progressively disciplined. A corrective action did not precede the disciplinary action. This record cannot sustain a finding that complainant's conduct was "so flagrant or serious" as to warrant immediate disciplinary action. Individually, complainant's acts do not warrant immediate discipline. They are unrelated. One did not lead to the other. They cannot be grouped together to show a "pattern" of misconduct over a period of a little more than one week out of a thirteen-year career so as to form an act or omission "so flagrant or serious" as to make immediate disciplinary action appropriate.

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<sup>1</sup> On October 20, 1998, the Rules of the State Personnel Board were repealed and replaced by new rules which were made effective for actions commencing on or after December 31, 1998.

The August 3 incident does not warrant immediate discipline. Complainant tried to talk to her supervisor as soon as she found out about her need to take her daughter to the doctor. The conversation was cut short because the supervisor was in a meeting. Complainant advised the other nurses and the staff physician that she had to leave early. She did not actually abandon any patients who needed her care. The supervisor was able to cover the nurses' duties from 4:00 to 5:00, though she was inconvenienced. There were no walk-ins during that hour. Although these circumstances do not justify a nurse leaving her post without prior permission, the conduct was not "so flagrant or serious" as to warrant depriving a certified employee of her constitutional and statutory right to be disciplined only for cause. *Kinchen, supra*. Complainant did not "just walk off the job" in the sense of job abandonment. She was indisputably a thirteen-year skilled and competent nurse with a good employment record.

The August 5 incident stemmed from an angry physician who believed that a patient should never be left in the Observation Room unattended. There was some disagreement among staff physicians on this topic, and a formal policy mandating complainant's presence was not in place. As a group, the nurses did not always remain with a patient in the Observation Room. Indeed, on the day of complainant's R8-3-3 meeting, another nurse twice left a patient alone in the Observation Room without consequence to the nurse. Like the August 3 incident, the August 5 incident does not rise to the level of "so flagrant or serious" as to warrant immediate dismissal.

The episode of complainant administering a hearing test to another employee in an effort to help determine a suitable location for the employee's desk is minor in importance. No harm was done. Even complainant's supervisor testified that she, herself, probably would not have taken any adverse action against complainant for this deed. It certainly does not constitute just cause for dismissal, especially without notice.

In addition to the above, based upon the evidence as presented, the appointing authority did not fairly and candidly consider the factors governing the decision of whether to correct or discipline an employee, inclusive of the employee's previous performance evaluation, as set out in Rule R8-3-1(B), 4 Code Colo. Reg. 801-1.

Because respondent could not prevail as a matter of law, it was incumbent on the judge to grant complainant's motion to rescind the disciplinary action. *Montes, supra; French v. Haarhues, 287*

P.2d 278 (Colo. 1955). See *Villalon v. Department of Higher Education*, Case No. 98B148 (Thompson, Initial Decision 1998) (directed verdict in favor of respondent); *Cathcart v. Department of Corrections*, Case No. 95B052 (Thompson, Initial Decision 1995) (directed verdict in favor of complainant). See also *Sinks v. Department of Human Services*, Case No. 98B043 (Thompson, Initial Decision 1998) (lack of progressive discipline).

This record is insufficient to determine that complainant gave notice of her wish to use Family and Medical Leave Act (FMLA) leave, or that the condition of dyslexia is a "serious health condition" covered by the FMLA. 29 USC § 2612(a); 29 USC § 2612(b). Complainant requested annual leave, which is paid leave. FMLA leave is unpaid leave. Therefore, I find that the FMLA is inapplicable.

There is no evidence of record to show that the disciplinary action was imposed as an act of retaliation<sup>2</sup>. Although the appointing authority was mistaken in his conclusion, he set forth three reasons for his action. It cannot be found that the action of the appointing authority was "instituted frivolously, in bad faith, maliciously, or as a means of harassment, or was otherwise groundless,...." § 24-50-125.5, C.R.S.

#### **CONCLUSIONS OF LAW**

1. Respondent's action was arbitrary, capricious or contrary to rule or law.
2. Respondent did not violate the Family and Medical Leave Act.
3. Complainant did not show that she was retaliated against.
4. Neither party is entitled to an award of fees and costs.

#### **ORDER**

The disciplinary action is rescinded. Complainant shall be reinstated to her former position with full back pay and benefits, less the appropriate offset, if any.

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<sup>2</sup> Complainant did not waive her right to present evidence in the event of the denial of her motion for a directed verdict or a successful appeal of the order granting the motion. C.R.C.P. 50.

DATED this \_\_\_\_\_ day of  
February, 1999, at  
Denver, Colorado.

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Robert W. Thompson, Jr.  
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), C.R.S. 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), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. 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).

### **PETITION FOR RECONSIDERATION**

A petition for reconsideration of the decision of the ALJ may 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. 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.

### **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 is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional 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 ½ inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

**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 R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

**CERTIFICATE OF MAILING**

This is to certify that on the \_\_\_\_ day of February, 1999, 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 M. Iten  
Attorney at Law  
3333 Quebec Street, Suite 7500  
Denver, CO 80207

and in the interagency mail, addressed as follows:

L. Louise Romero  
Managing Senior Associate University Counsel  
Office of the University Counsel  
University of Colorado at Boulder  
203 Regent Administrative Center  
Boulder, CO 80309-0013

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