

State Personnel Board, State of Colorado

Case No. 99 B 086

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RICHARD A. BATTISTE,

Complainant,

v.

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

Respondent.

Hearing was held on April 23, 1999 before administrative law judge G. Charles Robertson at 1525 Sherman Street, Room B-65, Denver, CO 80203.

MATTER APPEALED

Complainant appeals his termination by Respondent and claims that such action was arbitrary and capricious.

The action of Respondent is REVERSED. Complainant is to be reinstated as set forth below.

PRELIMINARY MATTERS

Respondent, Department of Human Services, Colorado Mental Health Institute at Pueblo, ("Respondent" or "CMHIP") was represented by Stacy Worthington, Assistant Attorney General. Complainant was represented by Carol M. Iten, Esq.

1. Respondent's Motion for Extension of Time and Motion to Continue Hearing.

On April 20, 1999, Respondent filed its Motion for Extension of Time and Motion to Continue Hearing ("Respondent's Motion"). Respondent's Motion requested additional time to respond to Complainant's Motion for Summary Judgment and to file a cross-motion for summary judgment. Respondent further requested that the hearing be vacated. On April 20, 1999, the administrative law judge reserved ruling on Respondent's Motion given the timing of the request and that hearing was to be convened within 3 days.

At the time of hearing, after soliciting whether or not there were any stipulations as to findings of fact between the two parties given competing motions for summary judgment, the parties indicated they could not stipulate as to any findings of fact. As a result, the administrative law judge denied both parties' motions.

2. Procedural History

Complainant filed his Notice of Appeal on February 12, 1999. Complainant appealed his termination of employment with Respondent. Complainant claimed that the actions of Respondent were arbitrary and capricious and/or contrary to rule or law.

At the conclusion of Respondent's case-in-chief, Complainant moved for a directed verdict under the rubric of C.R.C.P. 50. Based on the findings of fact and discussion below, the motion was granted.

3. Witnesses

Respondent called the following witnesses in its case-in-chief: (1) Dr. Charles Bennett, Institute of Forensic Psychiatry, CMHIP, and appointing authority, CMHIP, Pueblo, CO; and (2) Complainant.

4. Exhibits

The following Respondent's exhibits were admitted into evidence: Exhibit 1 - Correspondence/Disciplinary Action dated February 4, 1999; and Exhibit 2 - Transcript of R-6-10 Meeting.

ISSUES

1. Whether Complainant committed the acts for which discipline was imposed;
2. Whether the discipline imposed was within the range of reasonable alternatives available to the appointing authority;
3. Whether the appointing authority's actions were arbitrary, capricious, and/or contrary to rule or law; and
4. Whether a party is entitled to an award of attorney fees pursuant to C.R.S. 24-50-125.5.

FINDINGS OF FACT

I. RESPONDENT'S BACKGROUND

1. CMHIP maintains the Institute for Forensic Psychiatry ("IFP"). IFP has approximately 290 patients at any given time. A majority of the patients are adjudicated as "not guilty by reason of insanity" through the criminal justice system. Eighty percent of the patients committed to IFP have been involved in some type of violent criminal offense.
2. IFP has approximately 300 staff, including 230 nursing staff. Included in the staff are positions known as Psychiatric Technicians. Such staff work throughout CMHIP, including on the Maximum Security Unit of IFP.
3. A Psychiatric Technician has a number of job duties including being the "front line" staff on all units of IFP. A technician is responsible for interacting with patients, setting rules, enforcing rules within a unit, interacting with all nursing staff. It has been characterized that such technicians are the primary therapists for many patients. A psychiatric technician's duties include meeting with patients one on one for one hour a week, participating in group therapy during the week with patients, working on treatment plans for patients, and building trust with patients.
4. At the time discipline was imposed and with regard to Complainant, Dr. Charles Bennett was the properly delegated appointing authority. Bennett worked for CMHIP for the past 12 years and has been Director of IFP since August 1997. In part, Bennett's responsibilities included managing the activities of the division, establishing program priorities, and carrying out the policies and procedures of the state personnel system.
5. Bennett obtained his doctorate's from Ohio University in 1976 and has a professional license in psychology and clinical psychology. Prior to being Director of IFP, Bennett was IFP's chief psychologist from 1991 to 1997. Contemporaneously, he was a member of the hospital disposition committee which was responsible for making determinations as to a patient's release from IFP. He also was unit psychologist for the Maximum Security Unit of IFP.

II. COMPLAINANT'S BACKGROUND

6. Complainant has been an employee for CMHIP since November 1992 and is certified in the position of Psychiatric Technician II.
7. Prior to 1999, Complainant had two previous convictions related to driving under the influence of alcohol.
8. Complainant's performance had been rated as commendable and/or good during the course of his employment with CMHIP.
9. Complainant had not received any corrective or disciplinary actions during the course of his employment.

III. EVENTS OF RELATED TO THE IMPOSITION OF DISCIPLINE

10. Complainant was convicted of driving under the influence based on an arrest on April 28, 1998. (Exhibits 1, 2).
11. The day after his arrest, Complainant disclosed to his supervisor, Mark Cordova, that he had been arrested.
12. At the time of his conviction in January 1999, the court provided Complainant with an option as to his sentence. Complainant was given the choice of either being incarcerated for 45 days or to serve in-home detention for a period of 90 days.
13. With regard to this matter, in-home detention required Complainant to wear an ankle bracelet for 90 days. Such a bracelet would electronically account for Complainant's whereabouts. The bracelet is attached at the ankle. While characterized as in-home detention, Complainant would have the ability to go to work and would still be in compliance with the sentence.
14. Complainant reported to his supervisor that he would be required to serve a sentence as determined by the court. Complainant also reported that he had chosen to exercise the option of in-home detention and wear an ankle bracelet. (Exhibit 2).
15. On January 28, 1999, a notice of an R-6-10 meeting was provided to Complainant. The notice indicated that Respondent had received information that Complainant had received a DUI conviction and that the DUI conviction and its ramifications may be grounds for administering disciplinary action. (Exhibit 2).
16. Bennett, the designated appointing authority, met with Mr. Robert Hawkins, Superintendent of CMHIP, on or about January 28, 1999 regarding the situation. At such time, Hawkins and Bennett discussed the ramifications of the in-home detention sentence.
17. Subsequently, on February 2, 1999, an R-6-10 meeting was held between Complainant and Bennett. During the R-6-10 meeting, Complainant disclosed the circumstances of his conviction, volunteered that it was his third conviction, and detailed the in-home detention sentence. (Exhibit 2).
18. At the R-6-10 meeting, Bennett stated that he could not "let [Battiste] work at the hospital with that ankle bracelet, any place in the hospital and any division at the hospital for a couple of reasons...one would be certainly the adverse affect on the agency and the other I think would be the adverse effect on you." (Exhibit 2).
19. Respondent expressed concerns that if an employee was to wear an ankle bracelet to work, that employee might be subject to "targeting by patients" and that the wearing of such a device would be apparent to patients. The appointing authority concluded at the time of the R-6-10 meeting that the wearing of the bracelet would effect Complainant's ability to work at

CMHIP and at IFP. (Exhibit 2).

20. Respondent provided Complainant with an option: Complainant could take voluntary leave without pay for the period of his in-home detention or he would be terminated. Bennett clearly expressed during the R-6-10 meeting that upon completion of Complainant's legal obligations, he would be able to return to his position at IFP. (Exhibit 2). Bennett corroborated this statement at hearing.
21. Initially, Complainant indicated he would take the leave without pay option, but within 24 hours, changed his mind and indicated he would not exercise this option.
22. On February 4, 1999, pursuant to correspondence, Complainant was terminated for inability to perform job duties because Complainant was considered a direct-care employee and would be unable to work with patients. (Exhibit 1). Respondent based the imposition of discipline based on the fact that Complainant would be wearing an ankle bracelet. The discipline imposed was not based upon the underlying conduct that required Complainant's sentence of in-home detention. Nor was it based on any actual adverse impact upon Respondent.
23. Dr. Bennett believed that the wearing of the ankle bracelet would compromise Complainant's ability to form trusting relationships with patients and prevent Complainant from demonstrating he was responsible for his criminal behavior.
24. Dr. Bennett had never seen an ankle bracelet at the time discipline was imposed.
25. CMHIP did not have a written policy forbidding employees from wearing ankle bracelets at the time of discipline, or prior thereto. Such a policy was implemented on March 1, 1999. Complainant was not disciplined for violating any policies of CMHIP.
26. Dr. Bennett recognized that at least one other employee had been required to wear an ankle bracelet while employed at CMHIP during the spring of 1998. That employee was not allowed to work at IFP but was able to work at CMHIP in other divisions.
27. Dr. Bennett would have allowed Complainant to accept the jail sentence and would have retained his position until Complainant's return. Bennett would also have allowed Complainant to take leave without pay for 90 days during the in-home detention sentence. Bennett acknowledged that this would have been voluntary leave without pay and would not be considered discipline.
28. Bennett was informed that there might be other options available for in-home detention besides the use of an ankle bracelet. However, Bennett did not consider other options based on discussions with CMHIP's superintendent.
29. Bennett believed that after having completed his sentence, Complainant would be able to

return to work and that he had no concerns about Complainant returning to work vis-a-vis Complainant's ability to perform his job and interact with patients.

30. Bennett was not aware of any complaints made by patients regarding employees wearing ankle bracelets.

31. Board Rule R-6-2, 4 CCR 801, provides:

A certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. The nature and severity of discipline depends upon the act committed. When appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination.

32. Board Rule R-6-6, 4 CCR 801, provides:

The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered.

33. Board Rule R-6-9 , 4 CCR 801, provides, in part:

Disciplinary actions may include, but are not limited to, an adjustment of base pay to a lower rate in the pay grade, demotion, dismissal, and suspension without pay for up to 30 days.

...

Reasons for discipline include: . . . inability to perform, final conviction of a felony or other offense of moral turpitude that adversely affects the ability to perform the job, or has an adverse effect on the agency if employment is continued.

DISCUSSION

I. INTRODUCTION

A. Burden of Proof

Certified state employees have a property interest in their positions and may only be terminated for just cause. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 (1998) and generally includes: (1) failure to comply with standards of efficient service or competence; (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment; (3) willful failure or inability to perform; and (4) final conviction of a felony or any other offense involving moral turpitude.

In this disciplinary action of a certified state employee, the burden of proof is on the terminating authority, not the employee, to show by a preponderance of the evidence that the acts or omissions upon which discipline was based occurred and just cause existed so as to impose discipline. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

B. Witness Credibility

In *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987), the Supreme Court of Colorado held that:

Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors including: the opportunity and capacity of a witness to observe the act or event, the character of the witness, prior inconsistent statements of a witness, bias or its absence, consistency with or contradiction of other evidence, inherent improbability, and demeanor of witnesses. Colorado Jury Instruction 3:16 addresses credibility and charges the fact finder with taking into consideration the following factors in measuring credibility:

- A witness' means of knowledge;
- A witness' strength of memory;
- A witness' opportunity for observation;
- The reasonableness or unreasonableness of a witness' testimony;
- A witness' motives, if any;
- Any contradiction in testimony or evidence;
- A witness' bias, prejudice or interest, if any;

**A witness' demeanor during testimony;
All other facts and circumstance shown by the evidence which affect the credibility of a witness.**

C. Motion for Directed Verdict

C.R.C.P. 50 provides in part: "A party may move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence." A motion for directed verdict should be granted only when the evidence has such quality and weight as to point strongly and overwhelmingly to the fact that reasonable persons could not arrive at a contrary verdict. See: *Jorgensen v. Heinz*, 847 P.2d 1981 (Colo. App. 1992), cert. denied. In passing upon motion for directed verdict, a trial court must view evidence in light most favorable to party against whom motion is directed, and every reasonable inference drawn from evidence presented is to be considered in light most favorable to that party. See: *Pulliam v. Dreiling*, 839 P.2d 521 (Colo. App. 1992).

II. PARTIES' ARGUMENTS

In Complainant's argument for directed verdict, Complainant states that with the evidence being viewed in the light most favorable to Respondent, there is no basis for termination. First, Complainant argues the fact that Respondent provided Complainant with a choice between termination or 90 days non-disciplinary leave without pay. Complainant maintains that the fact the Respondent would consider such an option demonstrates that discipline was not appropriate, let alone termination. Complainant further argues that pursuant to Board Rule R-6-2, regarding progressive discipline, Complainant's acts were not so serious or flagrant as to mandate termination. Instead, Complainant argues that based on the evidence produced by Respondent, some lesser measure could have been taken, i.e., a corrective action. Complainant further argues that given Bennett's testimony that having served a jail sentence instead of in-home detention would have allowed Complainant to keep his job demonstrates the arbitrary and capricious behavior of Respondent. Complainant further delineates that no evidence was proffered demonstrating that CMHIP suffered an adverse impact as a result of Complainant's actions, nor did any patients. Complainant argues that no written policy existed at the time of Complainant's sentence which would have caused Complainant to have considered his options regarding sentencing.

In response to Complainant's argument, Respondent maintains that in the day-to-day operations of CMHIP, appointing authorities must be permitted to make decisions to impose discipline as in this case. Respondent asks that the Board focus on the grounds for the sentencing (driving under the influence of alcohol) and note that Complainant chose to drive with alcohol in his system. Moreover, Respondent maintains that Complainant had the option of serving a jail sentence instead of wearing an ankle bracelet. Respondent goes so far as to say that Complainant could have consulted with someone regarding his sentence prior to indicating to the court that he chose the in-home detention. Respondent maintains that Complainant could not perform his job duties with the ankle bracelet.

Respondent maintains that attorney fees should not be awarded in this matter and that the record of evidence does not support an award of fees pursuant to Board rule.

III. ISSUES BEFORE THE BOARD

A. Whether Complainant committed the acts for which discipline was imposed.

Respondent terminated Complainant for having to begin wearing an ankle bracelet while performing his duties as a Psychiatric Technician II. The evidence indicates that Complainant would be wearing an ankle bracelet for 90 days. Given that Complainant had a full time position, he would be wearing the bracelet for approximately 60 work days. It is clear from the testimony as well as demonstrative exhibits that Complainant was terminated by Respondent solely for wearing an ankle bracelet and that such bracelet purportedly created an inability to perform job duties.

In Respondent's case-in-chief, taking the evidence as presented in the light most favorable to Respondent, Respondent failed to show by a preponderance of evidence that Complainant wearing an ankle bracelet would prevent Complainant from performing his duties as a Psychiatric Technician. Respondent's own witness testified that it was not the underlying conduct, i.e. offenses related to driving and alcohol, which precipitated the discipline. Respondent's witness Dr. Bennett testified about the therapeutic relationship between individuals in Complainant's position and patients at IFP. Testimony was solicited with regard to Psychiatric Technicians having to model behavior and avoiding being "targets" for patient exploitation. However, little or no evidence was provided which showed by a preponderance of evidence that the wearing of an ankle bracelet caused Complainant to fail to: (1) set rules or enforce rules in the unit; (2) interact with nursing staff; (3) meet with patients constructively for one on one sessions once a week; (4) effectively participate in group therapy during the week with patients; (5) effectively work on treatment plans for patients; or (6) effectively build trust with patients. Respondent would have the Board believe, based on the evidence in this record, that the wearing of an ankle bracelet *alone* would compromise Complainant's ability to engender trust with patients. Yet, the only testimony with regard to this issue is that of the appointing authority and the appointing authority clearly testified that he had never seen an ankle bracelet as at issue here. While the record demonstrates that the appointing authority was familiar with IFP and issues involved in the care of patients, Respondent failed to provide any evidence except the assertion by the appointing authority that the trust with patients would be compromised because of Complainant's bracelet. The appointing authority failed to specifically cite any examples in which Complainant's ability to engender trust was compromised or in which Complainant failed to perform his job duties. In fact, the appointing authority failed to proffer any testimony which would show that patients' trust in Complainant would be destroyed if he wore an ankle bracelet. Given the evidence presented and the findings of fact, it cannot be argued that Complainant was unable to perform his job.

B. Whether the discipline imposed was within the range of reasonable alternatives available to the appointing authority.

Based on the findings of fact and the evidence viewed in the light most favorable to Respondent, it cannot be argued that Respondent imposed discipline within the range of reasonable alternatives. Respondent's own evidence shows that Respondent was willing to allow Complainant to take time off/voluntary leave without pay OR be subject to disciplinary termination. This option was created as a result of Complainant not having to wear the ankle bracelet more than 90 days and having the ability to return to his employment without having to wear the bracelet. Testimony was also solicited that had a 45-day jail sentence been received by Complainant, instead of the in-home detention sentence, Respondent would allow Complainant to return to work. Respondent's position with regard to preserving trust with patients and Complainant's ability to perform his job is inconsistent based on this record. The appointing authority testified with regard to the impact on therapeutic relationships with patients if Complainant wore an ankle bracelet while working. In that testimony, Respondent's witness stated in the past the patients complained about staff who had "histories" of bad acts involving alcohol. Yet, if Complainant had exercised the option to take voluntary leave or jail, the patients could still know about his "history" and would still potentially complain. Under any of the sentencing scenarios, the relationships with patients could still be compromised based on Respondent's evidence. Yet, Respondent was willing to allow the leave with out pay option or jail option. Accepting Respondent's position and evidence on this issue, one cannot reasonably reconcile the termination of an employee while **wearing** an ankle bracelet for inability to perform his job yet allow him to return to work with the history of having **worn** an ankle bracelet or having been in jail. As a result, the level of discipline imposed cannot be within the range of reasonable alternatives.

Additionally, Respondent testified that Complainant had "good" to "commendable" performance ratings. Board Rule R-6-2, 4 CCR 801 provides that an employee shall be subject to corrective action before discipline unless the act for which discipline is imposed is so flagrant or serious that immediate discipline is proper. In this instance, based on the evidence in the record and viewing it in the light most favorable to Respondent, Respondent failed to demonstrate that termination was warranted because Complainant's action of wearing an ankle bracelet was "so serious or flagrant." The fact that CMHIP had no policy on the issue of wearing ankle bracelets at the time of Complainant's acts supports that the matter was not so serious as to warrant the need for a policy. Moreover, Respondent's own witness testified that other employee(s) had worn ankle bracelets and had been able to temporarily work at other divisions within CMHIP besides IFP. Thus, other employees in similar situations were given other options besides termination. This supports Complainant's position that the act of wearing an ankle bracelet was not so serious or flagrant as to warrant termination. This conclusion is supported by Board Rule R-6-6 which demands that a number of factors be considered in administering the level of discipline. Respondent's testimony displays that none of these factors were seriously considered.

C. *Whether the appointing authority's actions were arbitrary, capricious, and/or contrary to rule or law.*

Under the standards associated with ruling on a directed verdict, Respondent acted in an arbitrary, capricious, and/or contrary to rule or law manner. Not only did Respondent's evidence fail to show that Complainant was unable to perform his job, and failed to show that the discipline

imposed was with the range of reasonable alternatives, Respondent's evidence portrayed Respondent as engaging in arbitrary and capricious behavior. For example, Respondent provided testimony indicating that the appointing authority had never seen an ankle bracelet. Yet, the appointing authority testified that patients would be able to see it and be able to "target" Complainant. Without reaching the merits of whether or not patients would target the Complainant somehow, it is arbitrary and capricious for Respondent not to have even determined whether an ankle bracelet would be "in sight" of patients, thereby causing Complainant to be targeted. In other words, Respondent's own evidence clearly demonstrated that it never even truly considered and evaluated the risk of patients being able to see or know about Complainant wearing an ankle bracelet.

Additionally, as recited above, Respondent failed to show by a preponderance of evidence that it complied with Board rules related to progressive discipline.

In assessing the witness' credibility, it must be noted that the appointing authority's credibility was impacted by the reasonableness or unreasonableness of his testimony, his bias, and other facts and circumstances shown by the evidence which affect his credibility.

D. *Whether a party is entitled to an award of attorney fees pursuant to C.R.S. 24-50-125.5.*

C.R.S. 24-50-125.5 provides for the award of attorney fees and costs in matters related to personnel. Board Rule R-8-38, 4 CCR 801, provides the criteria for awarding attorney fees and costs when personnel actions are frivolous, in bad faith, a means of harassment, malicious, and/or groundless. Pursuant to rule, the party moving for attorney fees and costs shoulders the burden of proof on the issue. Given that a motion for directed verdict was made prior to Complainant's case-in-chief, Complainant must rely upon the evidence admitted in Respondent's case.

A frivolous action is defined as an action or defense in which it is found that no rational argument based on the evidence or the law is presented. Given the evidence in the record, Board rules, and the law, it is found that a rational argument was made by Respondent with regard to this personnel action, despite insufficient evidence being provided so as to prevail. A personnel action is found to be in bad faith, malicious, or used as a means of harassment when it is found that the personnel action was pursued to annoy or harass, was made to be abusive, was stubbornly litigious, or was disrespectful of the truth. No evidence has been introduced into the record to support such a finding in this matter. A personnel action is groundless when despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such action or defenses. Given the evidence introduced by Respondent, it must be concluded that no competent evidence was offered or produced in support of its personnel action. In *Bilawsky v. Faseehudin*, 916 P.2d 586 (Colo.App. 1995), it was held:

A claim is groundless if the allegations in the complaint, while sufficient to survive a motion to dismiss for failure to state a claim, are not supported by any credible evidence at trial. *This test assumes that the proponent has a valid legal theory but can offer little or nothing in*

the way of evidence to support the claim. Western United Realty, Inc. v. Isaacs, 679 P.2d 1063 (Colo.1984).

(emphasis added). In this instance, Respondent offered little or no evidence to support its claim that Complainant committed the acts for which discipline was imposed, that the level of discipline imposed was within the range of reasonable alternatives, or that Respondent's actions were not arbitrary, capricious or contrary to rule or law. Respondent offered one witness, besides Complainant, whose testimony failed to support Respondent's position. Complainant's burden was met based on the evidence presented.

CONCLUSIONS OF LAW

1. Respondent failed to demonstrate by a preponderance of evidence, even when taking the evidence in the light most favorable to Respondent, that Complainant committed acts for which discipline was imposed.
2. Respondent failed to demonstrate by a preponderance of evidence, even when taking the evidence in light most favorable to Respondent, that the discipline imposed was within the range of reasonable alternatives.
3. Given the evidence in the record, and viewed in the light most favorable to Respondent, Respondent's actions were arbitrary, capricious and contrary to rule or law.
4. Respondent's personnel action is found to have been groundless pursuant to C.R.S. 24-50-125.5 and Board Rule R-8-38, 4 CCR 801.

ORDER

The disciplinary termination of Complainant is REVERSED. Complainant is to be reinstated to his former position, with no loss in seniority or privilege, forthwith. Complainant is to receive back pay and benefits subsequent to the date of his termination. Complainant is awarded attorney fees and costs.

Dated this ____ day
of May, 1999.

G. Charles Robertson
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that on the ____ day of May, 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 Iten, Esq.
3333 Quebec Street, #7500
Denver, CO 80207

and in the interagency mail, to:

Stacy Worthington
Assistant Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203