

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 2000B012

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LINDA K. PAINE,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,
COLORADO STATE VETERANS CENTER,

Respondent.

Hearing was held on September 7, 1999 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Assistant Attorney General Jeannette Walker Kornreich. Complainant appeared and was represented by Castelar M. Garcia and M. Elizabeth Garcia, Attorneys at Law.

Respondent's witnesses were: Stephen P. Kralik, Administrator of the Colorado State Veterans Center; Roy Moruzzi, Director of Nursing; Vicki Velasquez, Donna Gilmore and Michelle Maes, Certified Nurse Assistants; and Staff Nurse Pamela Partin.

Complainant testified on her own behalf.

Respondent's Exhibits 1 through 21 were stipulated into evidence. Exhibit 22 was admitted without objection. Complainant's Exhibit A was excluded for failure to establish relevancy.

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A witness sequestration order was entered upon complainant's request.

MATTER APPEALED

Complainant appeals the termination of her employment. For the reasons set forth below, respondent's action is affirmed.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
3. Whether complainant failed to mitigate her damages.

FINDINGS OF FACT

1. Complainant, Linda Paine, commenced employment with respondent, the Colorado State Veterans Center, Homelake, Colorado as a registered nurse (RN) in April 1993. In the spring of 1996, she became Shift I Coordinator (Charge Nurse).

2. In August 1997, Roy Moruzzi, the Director of Nursing and complainant's immediate supervisor, issued a written directive for complainant to improve her behavior in the area of customer service based upon four incidents of complainant acting rudely towards the members of the families of residents. (Exhibit 17.)

3. Complainant gained a reputation for being rude to families of residents and to Veterans Center staff members. Moruzzi frequently discussed with her the need to improve her skills in interpersonal relations and customer service. He made notations to this effect on her performance appraisals. (Exhs. 13, 14, 15, 16.)

4. In August 1999, Moruzzi issued complainant a corrective action for rude and unprofessional behavior towards residents, families and co-workers. (Exh. 2.)

5. In May 1999, Stephen Kralik, Administrator and appointing authority for the Veterans Center, issued a disciplinary action and concurrent corrective action for failure to perform competently, stemming from an incident in which complainant mishandled medication. The disciplinary action imposed a six-month reduction in pay from May 1, 1999 through October 31, 1999. (Exh. 4.)

6. In the morning of June 11, 1999, complainant attempted to obtain certain physician-ordered cultures from a resident who refused to have the cultures taken. The resident skipped a meal because he did not feel well enough to get out of bed. In the afternoon, Certified Nurse Assistant (CNA) Vicki Velasquez noticed that the resident felt warm and found his temperature slightly in excess of 103 degrees. RN Pamela Partin came in and did an assessment of the resident, observing that he was not feeling well and was somewhat confused. She reported the incident to complainant and administered Tylenol to the resident, reducing his temperature within about a half-hour.

7. It is the responsibility of the Charge Nurse to make

patient assessments when appropriate or else delegate the duty. A patient has a right to refuse treatment.

8. On June 12, 1999 at approximately 6:45 a.m., CNAs Donna Gilmore and Michelle Maes went into a resident's room to get him up and found him lying in a large amount of liquid stool and blood. Immediately, they went to the Charge Nurse, complainant, to inquire as to whether they should get him up in view of his bleeding condition. Complainant and Partin were having a change-of-shift meeting with the graveyard shift nurse. Complainant responded: "Go ahead and get him up. It's just hemorrhoids." CNA Gilmore stated that she did not think so. CNA Maes said that someone should go check on him because there was a lot of blood. With complainant looking down and no response forthcoming, Partin said she would go do it. When Partin arrived at the scene, the resident was still bleeding rectally. Partin did a five-minute assessment (e.g. vital signs) and called the doctor. The resident was transported to the hospital by ambulance and was subsequently diagnosed as having gastrointestinal bleeding, a potentially very serious condition.

9. Concerned that complainant had neglected her responsibilities as Charge Nurse by not appropriately assessing the medical condition of residents, Partin reported the incidents of June 11 and June 12 to Moruzzi, who informed Administrator Kralik.

10. Complainant left for a two week-plus vacation. When she returned to work on June 30, she was advised by Kralik that she would be placed on administrative leave pending an investigation of the June events. Subsequently, all of the witnesses were interviewed.

11. A predisciplinary meeting was held on July 8, 1999. With respect to the June 11 occurrence, Kralik concluded that complainant should have fully assessed the resident at the time he refused to have cultures taken and when the resident's temperature was 103 degrees, and that she, as Charge Nurse, should have taken the appropriate action. As to the June 12 events, Kralik concluded that complainant performed incompetently when she took no action when told that a resident was lying in a large amount of blood and stool, finding that complainant should have told the CNAs not to get the resident up until an emergency assessment was carried out. Overall, Kralik concluded that a staff nurse stepped forward to do that which the Charge Nurse should have done.

12. In his choice of discipline, Kralik took into account the prior corrective action and the current disciplinary/corrective action, which was especially significant to him because it was so recent and still in effect. He also considered complainant's history of abruptness and rudeness.

13. Pursuant to State Personnel Board Rule R6-9, the appointing authority terminated the employment of Linda Paine effective at 5:00 p.m. on July 14, 1999 for failure to perform competently. (Exh. 1.)

14. Complainant Linda Paine filed a timely appeal of her dismissal on July 22, 1999.

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). The Board may reverse respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. *McPeak v. Colorado Department of Social Services*, 919 P.2d 942 (Colo. App. 1996).

The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). It is for the administrative law judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P. 2d 411 (Colo. App. 1995).

Respondent asserts that this is a case of progressive discipline and that complainant's conduct justified her dismissal. Respondent touts the credibility of its witnesses.

By contrast, complainant contends that the events of June 11

and 12 are not a proper subject for termination and that she was trying to improve her interpersonal skills. She places some significance in the fact that she was not notified of any allegations until she returned from vacation, but she does not attach an argument to go along with it. In her absence, a report was made and the appointing authority was informed. She received notification on the day of her return. She does not argue that she should have been contacted while on vacation or that respondent lacked due diligence in pursuing the matter.

I credit the testimony of witnesses Kralik, Moruzzi, Velasquez, Gilmore, Maes and Partin in determining that the incidents of June 11 and 12, 1999, together with complainant's prior corrective action, current corrective and disciplinary action and documented background of rude and inappropriate behavior warrant the termination of her employment.

The appointing authority investigated the matter thoroughly and without bias. It was appropriate for the appointing authority to consider previous offenses in reaching his termination decision.

The appointing authority honestly, fairly and candidly accounted for all of the factors appearing in R-6-6, 4 Code Colo. Reg. 801, which 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.

There was no agency abuse of discretion in this case. The

appointing authority properly administered complainant's dismissal pursuant to R-6-9, 4 Code Colo. Reg. 801.

Neither party is entitled to an award of attorney fees and costs. See R-8-38, 4 Code Colo. Reg. 801.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious or contrary to rule or law.

2. The discipline imposed was within the range of available alternatives.

3. No evidence was presented with respect to mitigation of damages.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of
September, 1999, at
Denver, Colorado.

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. The notice of appeal must be received by the Board no later than the 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) 894-2136.

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 September, 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:

Castelar M. Garcia
M. Elizabeth Garcia
Attorneys at Law
Box 90
Alamosa, CO 81101

and in the interagency mail, addressed as follows:

Jeannette Walker Kornreich
Assistant Attorney General
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