

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2002G129**

INITIAL DECISION AND ORDER DENYING RESPONDENT'S REQUEST FOR ATTORNEY FEES

KEVIN HARVEY,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, MOUNT VIEW YOUTH SERVICES CENTER,

Respondent.

THIS MATTER is before the ALJ on respondent's request for attorney fees, which was heard on April 2, 2003. For the reasons stated below, respondent's request for attorney fees is **denied.**

DISMISSAL ORDER

Complainant's petition for hearing was dismissed by a Dismissal Order dated February 14, 2003, and a hearing was scheduled on respondent's request for attorney fees. The Dismissal Order is incorporated herein by reference. Complainant filed a request for State Personnel Board (Board) review of that Dismissal Order and need not file another appeal to preserve that for Board review; however, if he wishes to pursue Board review he must file a designation of record pursuant to § 24-4-105(15), C.R.S., and the Notice of Appeal Rights attached to this Order.

FINDINGS OF FACT

The factual background of this case is described in detail in the Dismissal Order and will not be repeated here except as necessary to explain the ruling on attorney fees. The statement of factual background in the Dismissal Order is incorporated herein as Findings of Fact.

As part of his job at the Mount View Youth Services Center, complainant was required to administer medications to juveniles in Mount View's custody. Complainant testified at the attorney fees hearing that he had transferred to Mount View from the Youth Offender System in September 1997. On his first day at Mount View, he talked to supervisor Brett Buford because he was told to administer medications without being trained. Buford told him not to worry.

Complainant testified that he received training in medication administration in April 1998, and that he began to be concerned about Mount View's medication administration program in June or July 1998. Complainant believed that he was not properly trained to administer medication and that there were legal and liability issues in having inadequately trained employees administer medications. However, complainant did not say anything about his concerns until September 1998, when he told supervisor Jeannie Vivian that he did not think his training had been adequate. Complainant expressed concerns to his supervisor because she had been pointing out his medication errors.

In spring 1999, complainant received two corrective actions for medication administration errors. Complainant received a third corrective action on December 31, 1999, which was related to medication administration and other issues. Complainant grieved the corrective actions. Throughout the grievance process, complainant raised the issue that Mount View had not complied with the statute governing medication administration training because he had received no more than two hours of training, not the four hours required by statute; he had not received the required practicum test; and he had never filled out an application or paid a fee for the training. Complainant was not satisfied with the outcome of the grievance, so he filed a petition for hearing with the Board and was granted a hearing.

In December 2001, complainant settled his Board appeal. The settlement agreement required Mount View to take the following actions with respect to its medication administration program:

10. PRACTICUM, EXAM AND 4 HOUR TRAINING. The State Agency agrees to do the following: (1) coordinate a meeting between Dr. David Wells, Wendy Nading and the State Agency trainers to determine how best to implement the curriculum approved by CDPHE; (2) instruct Dr. Wells to determine who needs re-training or a refresher course based upon the approved curriculum and to ensure that employees in need of re-training or a refresher course receive it; and (3) instruct its counsel to confer with Mark Rau, Esq. regarding C.R.S. § 25-1-107 (2001) and the approved curriculum. If necessary, counsel for the parties will make recommendations to Dr. David Wells regarding how he may best implement the curriculum in accordance with C.R.S. § 25-1-107 (2001).

On February 10, 2002, complainant received a "half-sheet" performance documentation form for failing to check the medication logs daily. Complainant grieved the half-sheet. His original written grievance, which was written and signed by complainant's attorney and not by complainant himself, contained the following Statement of Grievance:

On 2/10/02, Mr. Harvey was issued a half sheet dealing with medication administration errors allegedly committed by employees Mr. Harvey supervises. Mr. Harvey has repeatedly spoken out on the issue of illegal training of the staff at Mount View regarding medication administration. It is arbitrary and capricious to give this half sheet to Mr. Harvey when the staff he supervises has not been properly trained in medication administration. This half sheet is also given in retaliation for his whistleblowing activities. Lastly, because Mount View has not

instituted legal training regarding medication administration, Mount View has breached the agreement it reached with Mr. Harvey in December, 2001.

The grievance requested the following relief:

Rescission [sic] of the half sheet.

Compliance with the terms of the settlement agreement between Mr. Harvey and Mount View.

Compensation for emotional distress based on his whistleblowing activities.

Attorneys' fees and costs.

The May 24, 2002 final grievance decision noted that the half-sheet had been removed from complainant's file at an earlier grievance step, and it described the process Mount View had completed to comply with the settlement term quoted above. The final grievance decision included the following statement: "Your contention that Mount View has not instituted legal training regarding medication administration is not well founded. **While you articulated a number of other concerns** at the May 10th, 2002 grievance meeting **they attempted to address issues that are beyond the scope of this written grievance** therefore I must deny your request for relief." (Emphasis added.)

Complainant testified that Mount View did things that were not required by the settlement agreement quoted above. For example, complainant believes that Mount View had an approved medication administration program in place at the time of the settlement agreement and did not need to create a new curriculum. However, complainant did not identify any provision of the settlement agreement that Mount View had not fulfilled by the time he received the final grievance decision. Mount View did coordinate a meeting between its trainers, Dr. Wells, and Ms. Nading to determine how to implement a CDPHE-approved curriculum. There was no evidence that Dr. Wells directly determined the training or refresher needs of Mount View staff, but complainant admitted that Brett Bartleson made that determination and developed a list of staff who needed additional training. The only reasonable inference is that Bartleson was acting on Dr. Wells' behalf in order to carry out the settlement agreement, and complainant produced no evidence to rebut that inference. Complainant also admitted that he had received additional training sometime between the date he received the half sheet and the date he filed his petition for hearing. It is reasonable to infer that the additional training was the refresher training referenced in the settlement agreement, and complainant produced no evidence to rebut that inference. Finally, Mount View's prior counsel did confer with Mark Rau concerning the statute and the approved curriculum. Mr. Rau testified that he had exchanged voice messages with Mount View's prior counsel, that he received a draft curriculum from Mount View's prior counsel, and that he responded with comments on that curriculum and the need to comply with the relevant statute. Mount View did, therefore, comply with the requirement that its counsel confer with Mr. Rau concerning the curriculum.

Based upon the information contained in the record, including testimony by complainant and Mr. Rau at the attorney fees hearing, I find that Mount View had complied with the provisions of the settlement agreement and that its compliance was documented in the final grievance decision.

Even though complainant received the substantive relief he had requested in his original written grievance, he nonetheless filed a petition for hearing with the Board. Complainant described the specific action being appealed as, "Denial of request for relief re Step IV meeting held on May 10, 2002 and issue of whether Mount View Youth Services Center had breached the December 14, 2001 Settlement Agreement in not instituting legal training regarding medication administration." The reason for the appeal was, "Mount View had failed to institute a legal medication administration program," and complainant requested the following relief: "Mount View institute a legal medication administration program, attorneys' fees, costs, and compensatory damages." This petition, like the original written grievance, was signed by complainant's counsel and not by complainant himself.

Throughout the grievance process, including the steps that occurred after complainant's counsel filed the original written grievance, complainant persisted in discussing his contentions that he was improperly required to identify and count medications, to place them in bottles and give them to residents, and to carry a key to the pharmacy. Complainant also consistently complained that he had never been required to apply and pay a fee to participate in a medication administration program. Complainant pursued these issues because he was concerned for the safety of facility, staff, and youth; he was concerned about staff liability; and he felt he was being asked to violate the law by being required to identify medications, put them in bottles, and dispense them.

Complainant testified that he believed Mount View had not provided him grievance relief because its medication administration program did not comply with § 25-1-107, C.R.S. (2001). In his opinion, Mount View's requirement that he identify, count, package, and administer medications, and that he carry keys to the pharmacy, all violated the statute.

Complainant believed that he had properly raised and preserved these issues throughout the grievance process. He did not understand that his original written grievance did not raise these issues, and that it was limited only to removal of the half sheet and compliance with the settlement agreement. One sentence of complainant's original written grievance stated, "Lastly, because Mount View has not instituted legal training regarding medication administration, Mount View has breached the agreement it reached with Mr. Harvey in December, 2001." Complainant believed that sentence not only incorporated the issues in the settlement agreement, but it also included his contentions that two days after signing the settlement agreement, he was ordered to identify, count, package, and administer medications without filling out an application, paying a fee, attending a 4-hour training course, and passing a practicum examination.

DISCUSSION

Section 24-50-125.5, C.R.S. (2002) provides, "if it is found that the ... appeal of [a personnel] action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, the employee bringing the appeal ... shall be liable for any attorney fees and other costs incurred by the ... agency...." Respondent argues that it is entitled to fees because complainant filed his petition for hearing after receiving the substantive

relief he had requested in his original written grievance, so his petition was frivolous or groundless. Board Rule R-8-38 defines “frivolous” as “an action or defense in which it is found that no rational argument based on the evidence or the law is presented,” and defines “groundless” as “an action or defense in which it is found that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense.”

Respondent requested attorney fees because complainant filed a petition for hearing after receiving the relief he had requested, namely removal of the half sheet and compliance with the settlement agreement. Complainant's response stated that, though the half sheet was removed before the end of the grievance process, complainant continued to pursue his grievance “in order to obtain the further relief available to him under the whistleblower statute,” including issuance of disciplinary actions against anyone responsible for a retaliatory act, report to the state auditor and governor, and reimbursement of attorney fees and costs.

Complainant argued that, unless whistleblowing employees are allowed to proceed to the Board even after the allegedly retaliatory action was removed, an agency could repeatedly issue retaliatory disciplinary actions against employees and remove those actions in the grievance process, with no opportunity for the employee to obtain relief for repeated retaliation.

Complainant's argument is not frivolous or groundless. It is not irrational to assert that an employee who received substantive relief through the agency grievance process may still assert a whistleblower claim in order to ward off future harassment and retaliation.

It is true that complainant's whistleblower complaint was dismissed because it was filed more than 30 days after complainant received the half sheet. Complainant followed the agency grievance process, which took longer than 30 days, before seeking review by the Board. There is nothing in the whistleblower statute that permits the Board to toll the 30-day limit when an employee files a grievance, so the Board lost jurisdiction to consider complainant's whistleblower complaint.¹ However, the Board has strong policies encouraging parties to attempt to resolve their differences at the lowest possible level. *E.g.*, Board Rule R-8-1: “Disputes should be resolved at the lowest level and as informally as possible.” Complainant acted in conformity with this policy when he pursued his grievance before filing a whistleblower complaint, and he should not be subject to a fee award for doing so.

Finally, complainant's testimony at the hearing on attorney fees demonstrates that he had a sincere belief that Mount View had not granted him the relief he wanted in his grievance. Board Rule R-8-8(2) states that “Only the issues set forth in the written grievance shall be considered thereafter,” and that written grievance was limited to two issues: (1) removal of the half sheet, and (2) Mount View's compliance with the settlement agreement. The first issue was resolved in the grievance process, there is no dispute about that. It is clear from the record that Mount View complied with the settlement agreement, but it is also clear from the record that

¹ Because complainant's whistleblower complaint was investigated and no reasonable basis was found, complainant may be able to file a civil action in district court pursuant to § 24-50.5-105, C.R.S.

complainant believed there were still significant pending issues that were not resolved in the grievance process. Complainant believed that his written grievance included his concerns about being required to identify, count, and dispense medications, to carry keys to the pharmacy, and other issues. The final grievance decision states that complainant tried to address other issues, presumably these, throughout the grievance process. Again, complainant should not be subject to a fee award because the written grievance drafted by his counsel did not adequately describe all of his concerns.

Complainant's petition for hearing was not frivolous because complainant did present a rational argument based on the law to support the filing of his petition. Complainant's petition for hearing was not groundless because he did present evidence to support his petition, namely his testimony that he believed issues were raised in his grievance and not resolved. For all the foregoing, respondent's request for attorney fees is denied.

DATED this ___ day of
May, 2003, at
Denver, Colorado.

Stacy L. Worthington, Director
State Personnel Board
1120 Lincoln St., Suite 1420
Denver, CO 80203

CERTIFICATE OF MAILING

This is to certify that on the _____ day of **May, 2003**, I placed true and correct copies of the foregoing **INITIAL DECISION AND ORDER DENYING RESPONDENT'S REQUEST FOR ATTORNEY FEES** in the United States mail, postage prepaid, addressed as follows:

Cecilia M. Serna
940 Wadsworth Blvd. 4th Floor
Lakewood, CO 80215

Joseph Q. Lynch
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver CO 80203

Andrea C. Woods

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS:

1. To abide by the Initial Decision of the Administrative Law Judge ("ALJ's decision"), or
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, you must file a designation of record and a written notice of appeal with the State Personnel Board. The Board must **receive** the designation of record within 20 cdays of the date that the ALJ's decision was mailed, and must **receive** the notice of appeal within 30 days of the date that the ALJ's decision was mailed. If the Board does not receive a written notice of appeal within 30 days of the mailing date of the ALJ's decision, the ALJ's decision automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); §§ 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801.

PETITION FOR RECONSIDERATION

You have five days from the date you received the ALJ's decision to file a petition for reconsideration of the ALJ's decision. If you file a petition for reconsideration, that does not extend the 30-day deadline for filing a notice of appeal of the ALJ's decision.

RECORD ON APPEAL

If you appeal the ALJ's decision, you 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). You may pay this preparation fee by check or, if you represent a governmental entity, by submitting documentation of payment through COFRS.

If you wish to have a transcript made part of the record, you are responsible for having the transcript prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the designation of record. For additional information, contact the State Personnel Board office at (303) 894-2136.

The Board is subject to strict statutory time limits for appeals. You must review the statutes and Board rules that govern Board appeals and must strictly comply with all time limits. If you do not comply with the time limits, your appeal may be dismissed.