

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ELEANOR CASARES,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, PUEBLO REGIONAL CENTER,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on November 2 and 3, 2004, at the State Personnel Board, 1120 Lincoln Street, Suite 1420, Denver, Colorado. Complainant appeared through counsel, Patrick K. Avalos, Esquire. Respondent appeared through counsel, Assistant Attorney General Christopher Baumann.

MATTER APPEALED

Complainant, Eleanor Casares (“Complainant” or “Casares”), appeals her disciplinary termination, alleging she did not commit the acts upon which discipline was based.

For the reasons set forth below, the Respondent’s action is **affirmed**.

ISSUES

1. Whether Respondent’s disciplinary action was arbitrary, capricious, or contrary to rule or law;
2. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. At all times relevant, Complainant was a Health Care Technician I. She commenced employment with Respondent, Department of Human Services, Pueblo Regional Center (“PRC”), in 1989.
2. Complainant was a staff member at the Maher House, a PRC home for developmentally disabled individuals.

3. Maher House residents are physically rough with staff and routinely strike them. PRC staff are trained not to become emotional if attacked, in order to avoid hurting or injuring a resident. If a client acts out, staff are expected to re-direct the client's attention to something else.

PRC Abuse Policy

4. Respondent's Policy Number 1.4.A2 states in part,

“The PRC prohibits Abuse, Neglect, Exploitation, and Mistreatment in any form to any person receiving services. Failure to report witnessed, suspected, or second party information regarding Abuse, Neglect, Exploitation or Mistreatment shall be considered as serious as the act itself, and may result in appropriate corrective or disciplinary measures, which may lead to legal action.”

5. The policy defines Physical Abuse as follows,

“Physical abuse’ means the infliction of physical pain, injury, or the imposition of unreasonable confinement or restraint on a person. This includes directing a person to physically abuse another person receiving services.”

Maher House Resident “C.E.”

6. C.E. was a resident at the Maher House. He has a mental health diagnosis of “bipolar disorder, manic, in partial remission, Personality Change due to mental retardation, aggressive type, attention deficit hyperactivity disorder, combined type and autism.” In October 2003, he was twenty years old, but acted like a small child.
7. C.E. was a large individual, completely unaware of his own strength and ability to do harm to others. He was playful, and enjoyed rough-housing with other residents and staff. He often hit or pushed others, causing pain, then ran away, hoping to be chased.
8. C.E.'s medical record contained a “Safety Control Procedure.” When he exhibited aggressive behavior, staff were required to follow this procedure. The procedure notes the following,

“RATIONALE: Note: This is NOT a training plan. It is a plan to manage dangerous behaviors in a consistent manner. Since [C.E.] was admitted to Pueblo Regional Center, he has had several incidents that have required firm intervention. Interventions used have included the use of physical management techniques. [C.E.] engages in dangerous behaviors of physical aggression toward staff and peers. He is a large individual that responds well to verbal intervention from males, but tends to become more aggressive when only females are working.”

“DEFUSING METHODS. Verbal intervention techniques need to be tried prior to any hands-on interventions used with [C.E.]. . . . A ‘NO HANDS ON’ policy is recommended with Curtis, unless physical intervention is necessary.”

October 30, 2003 Incident Between C.E. and Casares

9. On October 30, 2003, at the beginning of her shift, approximately 7:30 a.m., Complainant was in the laundry room. C.E. ran into the room and hit or pushed another resident, H.R. C.E. then ran out of the laundry room.
10. A few minutes later, C.E. ran back into the laundry room and pushed Complainant hard. She fell over the mop bucket, and became wedged between the washer and dryer. This caused a tremendous amount of pain to her elbow, shoulder, and the back of her hip. She yelled out in pain.
11. C.E. ran out of the laundry room. His demeanor was playful. He ran over to the fireplace room. He stood at the arched entrance to the fireplace room.
12. Complainant, very angry, ran out of the laundry room, chasing C.E.
13. H.R. followed them both out of the laundry room and watched what happened next.
14. Complainant caught up with C.E. at the arched entrance to the fireplace room. C.E. had his back to the narrow brick wall at one end of the entrance to the fireplace room. Complainant stood directly in front of him.
15. C.E. was standing facing Complainant, with his arms at his side, and unclenched hands. He was not being aggressive with Complainant.
16. Complainant grabbed C.E.’s hands, pulled them up, and then bent them back at the wrists, so that they hyper-extended backwards towards his body in a very painful position.
17. C.E. yelled, “leave me alone!”
18. Complainant threw C.E.’s hands down. She then held his arms on his chest and pushed him hard, so that he fell backwards against the wall. He cried out in pain.
19. Complainant then left the area and went to the kitchen to speak with her co-worker, Donna Clementi.
20. H.R. was an eye-witness to this entire incident.

21. In addition, a student Health Care Technician in training, Kathleen deGuzman, was an eye-witness to the incident. DeGuzman barely knew Casares, and had seen her briefly on approximately two previous occasions.
22. DeGuzman was in the Maher House on October 30 to observe, as part of her training. At the time C.E. pushed Casares into the washer and drier, deGuzman was nearby, at the front desk. She heard Casares yell out in pain in the laundry room. Then she saw C.E. run out of the laundry room towards the fireplace room. Within seconds, she saw Complainant running after C.E., looking angry.
23. DeGuzman knew it was unusual for a staff member to chase a resident, so she left the front desk and followed Complainant and C.E. She stood and watched the entire incident related above, with an unobstructed view. In addition, she noticed that H.R. was present for and watched the entire incident as well.
24. Approximately five minutes after this incident, Complainant told deGuzman that she was taking C.E. on a van ride to calm him down. She took him to the psychologist's office and drove him around for one hour. When she returned, she stated to deGuzman that C.E. was "full of BM" and told her to wash him. She did so.

DeGuzman report

25. DeGuzman was extremely troubled by what she had seen. After work, she went to her supervisor's office to discuss what she had seen. He reinforced her duty to report it.
26. DeGuzman was nervous about reporting the incident. Recently, two weeks prior, she had been in a van with Complainant, when Complainant had made statements critical of PRC management. She had also told a story of a co-worker who had made a complaint against her; and has said she planned to "kick her butt," or words to that effect.
27. This experience caused deGuzman to fear retaliation by Complainant or possibly by others at PRC if she reported the incident.
28. On October 31, 2003, upon her arrival to Maher in the morning, deGuzman reported the incident to the Residential Coordinator, Beverly Tharp. DeGuzman filled out an incident report form. She wrote, "At approximately 7:40 a.m. after client #90381 had exhibited some behaviors, this student observed staff member Eleanor Casares approach client #90381 and bend his hands back at the wrist. Client #90381 grimaced telling staff to "Leave him alone." Staff then released client #90381's hands. Staff then shoved client #90381. Client #90381 then slammed into the wall. Staff then walked away."
29. DeGuzman also wrote a witness statement about having recently seen Casares and Donna Clementi, another staff member at Maher, taking medication from the client medicine cabinet. The medication was not a controlled substance; it was Tylenol, which was not subject to a daily count by staff.

30. Tharp, along with the residential director, immediately informed PRC Director Faye Weiser of the abuse allegation.
31. Pursuant to PRC policy, Respondent notified Department of Social Services and the Pueblo Police Department of the abuse report.
32. Weiser placed Complainant on paid administrative leave pending investigation of the abuse allegation, pursuant to PRC policy. This action protects the integrity of the investigatory process and the safety of the alleged victim.

Social Services Investigation; Pueblo Police Department Investigation

33. The Social Services Department assigned the investigation to a veteran investigator and lead worker, Shannon Green. Green has worked at that agency for seventeen years, and has conducted hundreds of investigations into allegations of abuse against youth and developmentally disabled adults.
34. Detective Keith Ervin, of the Pueblo County Sheriff's Office, was assigned to investigate the criminal claim of Assault Against an At Risk Adult.
35. Green and Ervin worked together to coordinate interviews. First, they reviewed deGuzman's Incident Report. Then, they interviewed her (Green first spoke with deGuzman briefly to assess her report. Then, she called in Ervin for a complete interview.)
36. Next, they set up a meeting with C.E. and H.R. at Maher House on November 5, 2003. Green arranged to have their case manager, Carol Perkins, present during the interview. Perkins knew C.E. and H.R. well, would make them feel comfortable during the interview, and was able to understand and interpret their statements.
37. H.R. confirmed that C.E. had run into the laundry room and pushed him and Complainant, and that Complainant had chased C.E. because she "was mad." Green asked H.R. what had happened in the atrium outside the fireplace room. H.R. re-enacted what he had seen. He showed Green how C.E.'s hands had been pulled back, how he had winced in pain, and how his hands had been thrown down. Green asked, "what happened next?" H.R. put his hands on his chest and pushed, stepping back, grimacing, and made an "uh" sound. Green asked, "who made C.E. do that?" H.R. said, "Eleanor" [Casares]. He made a noise indicating that C.E. had been in pain.
38. During this interview, H.R. also reenacted how Complainant had positioned her body to push C.E. H.R. placed one foot in front of another, put both hands in front of him in a pushing manner, and made a forward pushing gesture. When Green asked him, "was it easy, soft, or hard," he answered, "As hard as she could."
39. Green was convinced that H.R. was oriented as to what he was talking about, and that he was telling the truth about what he had seen. The fact that he re-enacted the exact same

incident deGuzman had reported served as extremely compelling corroboration of deGuzman's eye witness account.

40. C.E. is not very verbal, but he can say "yes" and "no." He was asked if anyone had hurt him. Green stated the names of all staff, to which he responded "no." However, when she gave Eleanor Casares' name, he looked at Carol Perkins, his case manager, and then said, "yes." He also cringed, made faces, and folded up his body defensively when Complainant's name was used during the interview.
41. Green and Ervin also interviewed deGuzman. Her report during the interview was consistent with her prior report. She was extremely upset and fearful of retaliation by Complainant. She did not want to have to participate in the interview, but she did so. She explained that Complainant had made threats about another co-worker who had made a report against her.
42. In Casares' interview, she did not offer explanations or specific denials of the incident. She stated that she did not know what she was being investigated for. When confronted with the detailed statement of deGuzman, she denied that she had even gone near the fireplace room. She stated that after C.E. had pushed her in the laundry room, she had gone directly to the kitchen to talk to Clementi. She did not attack the motives or credibility of deGuzman or H.R.
43. The two eye-witnesses to the incident, deGuzman and H.R., were reliable and lacked any motive to lie about the incident.
44. Green concluded that Complainant had physically abused C.E., and issued a written report to that effect.
45. Detective Ervin concluded that there was probable cause to charge Complainant with Assault Against an At Risk Adult, and he requested that the District Attorney's office prosecute the case. Ultimately, that office decided not to file criminal charges against Complainant, largely because H.R. would not be able to testify.

In-house PRC Investigation

46. After the Social Services Department and the Police Department filed their respective reports, pursuant to PRC policy, Director Weiser was required to assign the case to an in-house investigator. She chose Gina Fanelli-Valdez, another veteran lead investigator, who worked at Wheat Ridge Regional Center.
47. Fanelli-Valdez has masters and undergraduate degrees in marriage and family therapy. She has been an investigator for Wheat Ridge Regional Center since 1989. She has conducted hundreds of investigations into abuse, neglect, and mistreatment.
48. Fanelli-Valdez commenced her investigation in March 2004. She read the full reports of Green and Detective Irvin. She felt that interviewing the residents C.E. and H.R. again,

at this late a date, would be futile, as they did not know her and too much time had passed. Therefore, she spoke with Green, Detective Ervin, and case worker Perkins, in detail regarding their interviews with H.R. and C.E.

49. Fanelli-Valdez interviewed Casares (with her union representative present) for approximately three hours. Fanelli-Valdez found her to lack credibility. Casares made numerous statements that were contradicted by several prior statements and incident reports. For example, she stated for the first time that after returning from the van ride with C.E., it was only after they had been back in Maher House for “five minutes” when Clementi noticed that C.E. had a bowel movement. She took herself completely out of that fact scenario. She also said that it was Clementi who asked deGuzman to clean up C.E. However, Clementi had written two separate incident reports on the events of October 30, and had never referred to this. And, Casares had been aware of deGuzman’s statement about this for several months, and had never contradicted it in prior interviews.¹
50. In addition, Casares stated to Fanelli-Valdez that the reason she could not bathe C.E. at 9:05 a.m. on October 30 was because she “had so much paperwork and incident reports to write about the events of the morning.” However, she had written one incident report at 7:40 a.m. The other one she had signed on that day contained “8:00 a.m.” on it, but that time was crossed out and another time had been written in beside it. [That time is not in the record.] The other reports on C.E. for that day were written by Donna Clementi at 12:40 and 2:20 p.m., and Complainant had signed them as a witness only. Therefore, Casares’ statement about being too busy at 9:05 a.m. to bathe C.E. due to paperwork was obviously not true.
51. When Fanelli-Valdez confronted Complainant with these facts concerning the time at which incident reports had been written, Complainant said nothing, but looked at her with tears in her eyes.
52. Fanelli-Valdez found the eye-witness accounts of deGuzman and H.R. to have the greatest weight. She also found Complainant to lack credibility. She therefore concluded that Casares had engaged in physical abuse of C.E.
53. In her May 5, 2004 report, issued to Director Weiser, she concluded,

“the allegation of physical abuse is substantiated. Eleanor Casares was angry that C.E. had pushed her and caused her pain. She chased him through the house, cornered him in the atrium area of the fireplace room, bent his wrists back, and then shoved him into the wall, causing injury to Curtis. Eleanor left the house with Curtis and took him to see a psychologist to cover her tracks. She and donna had ample time during the programming day to collaborate their stories, even

¹ The most striking rebuttal of this statement, however, is found in the Stipulated Facts submitted by both parties and accepted into evidence. They state, in part, “Upon arrival, Complainant [Casares] informed Ms. DeGuzman that C.E. was ‘full of B.M.,’ meaning that C.E. had defecated on himself.”

though Donna most likely did not witness any of the interaction. Kathleen, the eyewitness and reporting person, was a student at the time, had no history with the alleged staff, Eleanor, and no identified motive to fabricate this incident. Eleanor was not truthful about the writing of the incident reports or Curtis' toileting needs/skills."

54. PRC Director Weiser read Fanelli-Valdez' report. She then sent Complainant a letter noticing a pre-disciplinary meeting pursuant to State Personnel Rule R-6-10.

Pre-Disciplinary Meeting

55. On May 13, 2004, Complainant, her union representative, Weiser, and Mary Young, Human Resource Manager, attended the R-6-10 meeting. Complainant's union representative stated that without a copy of Fanelli-Valdez' report, he and Complainant would be unable to rebut information upon which Weiser would be basing her decision.

56. Weiser agreed to allow Complainant and her representative to review the report and to re-schedule the R-6-10 meeting after they had reviewed it. They did obtain and review the report.

57. The second R-6-10 meeting took place on May 20, 2004, with the same participants present. At that meeting, Weiser stated repeatedly that the purpose of the meeting was for Complainant and her representative to present information she should consider prior to making a decision. Complainant and her representative stated that she had not engaged in the actions alleged. Her union representative challenged the Fanelli-Valdez report as being weak and poorly conducted. However, he presented no specific critique of her methodology, and no other mitigating information.

58. At hearing, Complainant argued that Weiser's statements about the report demonstrated she had pre-judged the case before the meeting occurred. Weiser had stated, "I want to again state that regardless of the review of that the conclusions will remain. I mean I am not here to change any conclusions. It went through the investigative process." Complainant's contention is rejected for the following reasons. First, the purpose of Weiser's statement was to clarify her role in the process; she was appropriately pointing out that it would have been grossly inappropriate for her to modify the conclusions of an investigation conducted by an independent, objective, professional third party. Second, Weiser stated clearly that she viewed the investigative report as a starting point. Third, when Complainant's representative requested a copy of the investigative report, Weiser's immediate response was to share it, and to agree to postpone the meeting, stating, "the purpose of this meeting is information gathering and I'm prepared to do that." An appointing authority who had already pre-judged the case and decided what action to take would not have responded in this manner.

59. Weiser's role as appointing authority was to take the report as a starting point in the pre-disciplinary process, to share the information with Complainant and her representative, and then to consider any and all mitigating information provided. She did so.

60. Complainant's union representative gave Weiser a general denial that Casares had engaged in the conduct alleged. Complainant said almost nothing, except that she knew in her heart she had done nothing wrong.
61. Neither Complainant nor her representative provided any information to Weiser on a possible motive for deGuzman to lie or make up an allegation against her. They provided no information attacking the credibility of H.R., deGuzman, or any other individual involved in the investigation.
62. After the pre-disciplinary meeting, Weiser spoke with Complainant's direct supervisor and reviewed her personnel record, including her evaluations. She found that Complainant had been a hard worker with a solid performance history.
63. Weiser learned from a supervisor that Complainant had been counseled about interpersonal issues. She gave this a negligible amount of weight in her ultimate decision. She did not discuss this information with Complainant prior to imposing disciplinary action.
64. Weiser contacted Carol Perkins, the case manager for H.R. and C.E. who had been present at their interview on November 5, 2003. She discussed in detail how well the case worker knew the two residents, the process used for interviewing them, how they responded to questions, and the evidence obtained from that meeting.
65. Weiser concluded that the information obtained from H.R. and C.E. at this meeting was highly reliable and credible.
66. Weiser also trusted the statement of deGuzman. She had no information upon which to question her credibility. The fact that H.R. had, without any prompting, re-enacted the same actions that deGuzman had reported, fully corroborated deGuzman's report.
67. Weiser determined that this case involved two credible witnesses, whose stories were remarkably consistent, versus an employee with a general denial. It was not a case of one person's word against another's. It was a case where the preponderance of evidence weighed heavily in favor of the conclusion Complainant had physically abused C.E.
68. Weiser considered corrective action and lesser forms of disciplinary action. In view of her overriding role as appointing authority to protect the individuals in PRC's care, unable to protect themselves, she determined that termination was the only choice available.
69. Weiser had no question that Complainant had physically abused C.E. Weiser felt that if Casares had admitted she had lost her temper with C.E., there might be a small possibility of working with her, to rehabilitate her. However, Casares' complete denial gave Weiser nothing to work with; she could not trust Casares enough to return her to the workforce.

70. On July 9, 2004, Weiser sent Casares the termination letter. She stated that she was terminating her employment based on “the serious nature of this matter, your denial of any wrong doing, and your unwillingness to provide further information that may help to reassure me that you take the role of advocacy and protections of at risk adults seriously.”

71. DeGuzman was a credible witness. Complainant contended that deGuzman lacked credibility, because she had made up a false accusation against her and Clementi, relating to taking client medications. This claim is rejected. DeGuzman reported that she saw Casares and Clementi taking Tylenol from a bottle containing dozens of such pills, intended for residents. Because these pills are not counted, Weiser determined that this allegation was impossible to prove, and she disregarded it. However, the fact that deGuzman raised the issue does not undermine her credibility.

DISCUSSION

I. BURDEN OF PROOF

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; § 24-50-125, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule R-6-9, 4 CCR 801 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 duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden 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. *Kinchen, supra*. The Board may reverse the agency’s decision if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. COMPLAINANT COMMITTED THE ACTS FOR WHICH SHE WAS TERMINATED

Respondent met its burden of proof. As the Findings of Fact illustrate, two eye witnesses provided the same account of what transpired on October 30, 2003. DeGuzman reported the incident to her supervisor after work on October 30, 2003, and submitted a written Incident Report the next day. H.R. was interviewed less than a week later, and he re-enacted exactly what deGuzman had reported. Complainant offered no evidence at hearing regarding any possible motive for deGuzman or H.R. to lie or fabricate a story about her. In fact, deGuzman was not comfortable in her role as a reporter of abuse against a co-worker. She came forward because she knew agency rules required her to do so and because she took her role as protector of at-risk adults seriously.

III. RESPONDENT'S ACTION WAS NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO RULE OR LAW

In determining whether an agency's decision is arbitrary or capricious, it must be determined whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

Respondent's policies require that when resident abuse is alleged, it must notify several different government bodies, so that investigations can be undertaken. In this case, both the Social Services investigator and the Pueblo Police detective conducted thorough investigations, interviewing H.R. and C.E., Casares, deGuzman, and Clementi. After those investigations were completed, Weiser was required to assure that PRC conducted an in-house investigation. Fanelli-Valdez conducted a thorough, professional, objective investigation, and issued a lengthy, detailed report. Weiser read that report, interviewed the case worker present during the H.R. and C.E. interviews, and determined for herself the reliability of the information considered by Fanelli-Valdez. She gave Complainant two separate opportunities to provide mitigating information. Hearing none, Weiser made the appropriate choice of termination.

Respondent used more than reasonable diligence and care to obtain all relevant evidence concerning what occurred on October 30, 2003. Weiser considered all evidence available to her. She made a reasonable decision.

Complainant's concern regarding Weiser's comments about the Fanelli-Valdez report at the pre-disciplinary meetings is understandable. However, Weiser was clarifying her role in the process, namely, that it would have exceeded her authority to modify the contents or conclusion of Fanelli-Valdez' report. Weiser made it clear that the report was just the starting point of the pre-disciplinary process, and that the purpose of the meetings was to exchange and receive additional information.

When a state agency promulgates rules governing the discharge of its employees which are more stringent in favor of the employee than due process would require, the agency must strictly comply with those rules. *Dept of Health v. Donahue*, 690 P.2d 243 (Colo. 1984); *Shumate v. State Personnel Board*, 528 P.2d 404 (Colo.App. 1974).

State Personnel Board Rule R-6-10, 4 CCR 801, mandates,

“When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the

employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision”

The pre-disciplinary meeting “must afford the employee a reasonable chance of succeeding if he chooses to avail himself of the opportunity to defend himself.” *Shumate*, 528 P.2d at 407. Neither Weiser’s statements at the pre-disciplinary meetings, nor any evidence presented at hearing, demonstrated that Weiser pre-judged the case or failed to give Complainant a full opportunity to defend herself. Weiser discontinued the first meeting in order to give Complainant and her representative access to the Fanelli-Valdez report. During both meetings, she repeatedly reminded Complainant and her representative that this was their opportunity to refute and attack the information in the report, and to provide mitigating information. Complainant and her representative simply failed to provide any information that rebutted the evidence of physical abuse on October 30, 2003.

Lastly, Complainant contended that Weiser violated Rule R-6-10 by failing to discuss her supervisors’ comments about counseling for interpersonal issues, prior to imposing discipline. This claim is rejected because the interpersonal issues had little, if any, weight in her decision. Weiser did not terminate Complainant for previous interpersonal issues. She terminated her for engaging in physical abuse of a client, denying it, and failing to provide Weiser with any reason to believe she could trust her in the future.

IV. COMPLAINANT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS

Complainant requested an award of attorney fees and costs. Because she did not prevail in this matter, there is no basis for such an award.

CONCLUSIONS OF LAW

1. Complainant committed the acts upon which discipline was based.
2. Respondent’s action was not arbitrary, capricious, or contrary to rule or law.
3. Complainant is not entitled to an award of attorney fees and costs.

ORDER

Respondent’s action is **affirmed**. Complainant’s appeal is **dismissed with prejudice**.

Dated this ____ day
of December, 2004, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203
(303) 764-1472

CERTIFICATE OF MAILING

This is to certify that on the ____ day of December, 2004, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE; NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Charles D. Esquibel, Esquire
222 S. Union Avenue
Pueblo, CO 81003

and in the interagency mail to:

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Andrea C. Woods