STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2007G073**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA PRIDEMORE,

Complainant,

vs.

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on March 10, 2008 at the State Personnel Board, 633 - 17th Street, Courtroom 1, Denver Colorado. Rebuttal evidence was presented on April 2, 2008 in Courtroom 6 in the same building. The record was closed on the record by the ALJ on the last day of hearing. Assistant Attorney General Eric Freund represented Respondent. Respondent's advisory witness was Nancy Lynch, the former Long Term Care Program Manager within the Health Facilities & Emergency Medical Services Division, Department of Public Health and Environment. Complainant appeared and was represented by Teresa A. Zoltanski, Esq.

MATTER APPEALED

Complainant, Barbara Pridemore ("Complainant") appeals the denial of her grievance over the issuance of a corrective action by Respondent, Department of Public Health and Environment, Health Facilities & Emergency Medical Services Division ("Respondent"). Complainant seeks removal of the corrective action from her file, reinstatement to Team Coordinator duties, attorney fees and costs and such other relief as warranted.

For the reasons set forth below, Respondent's action is **rescinded.**

PROCEDURAL HISTORY

Complainant petitioned the Board for review of the outcome of her grievance concerning a Corrective Action issued to her on December 14, 2006. The matter was set for preliminary review with Information Sheets due April 23, 2007. The deadlines were subsequently extended to April 30, 2007. Complainant did not file an Information Sheet by the deadline, and the appeal was dismissed without prejudice on May 10, 2007.

Complainant appealed that dismissal to the Board. On October 1, 2007, the Board ordered that the petition for hearing should proceed through the discretionary hearing process.

On November 7, 2007, a Preliminary Recommendation was issued which recommended "that Complainant's petition for hearing be granted solely on the issue of whether Respondent violated its internal grievance procedure, 'Professional Conduct.'" The Board considered the Preliminary Recommendation at its November 20, 2007 public meeting and voted to grant the hearing "solely on the issue of whether Respondent violated its internal grievance procedure, 'Professional Conduct." The case was then assigned to the undersigned, and a hearing was set for March 10, 2008.

HEARING ISSUES

1. Whether Respondent's action was arbitrary, capricious or contrary to rule or law.

2. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background:

1. Complainant is a certified Health Facilities Professional IV.

2. At the time of the filing of two complaints against her, Complainant worked as a long term care surveyor and as a Team Coordinator of surveyors conducting audits of long term care facilities. Respondent periodically sends teams of surveyors to long term care facilities, such as nursing homes, on unannounced inspections of the facilities. Surveyors are responsible for determining whether the facility is in compliance with applicable laws and regulations by observing conditions, speaking with staff and residents, and reviewing records. If a surveyor finds that the facility has violated the applicable standards, the surveyor issues deficiency notices. Respondent also responds to individual complaints of quality of care at facilities by sending surveyors to investigate and report on the specific complaints.

Complaint – Cambridge Care Center:

3. On October 3, 2006, Respondent received a letter addressed to Dr. Ellen Mangione, Director of the Health Facilities and Emergency Medical Services Division, from Terrylea Entsminger, the Nursing Home Administrator for the Cambridge Care Center.

4. Ms. Entsminger addressed a survey conducted at the Cambridge Care Center at

the end of July and beginning of August in 2006. Ms. Entsminger represented that she had never been treated as unprofessionally in her entire career in long-term care as she was during the most recent survey. She also represented that she had asked 16 employees who were directly involved in the survey to complete Respondent's "Facility Survey Evaluation" form asking for them to rate nine areas of performance by the surveyors on a scale from a rating of "Excellent" to" Poor" or "Not Applicable." A document which was represented as the compiled results from those forms was attached to Ms. Entsminger's letter. Ms. Entsminger also included seven quotes that she represented as written comments that had been provided along with the survey forms from Cambridge Care Center staff. None of the staff who had provided feedback on the survey process to Ms. Entsminger were identified by name.

5. The attached Facility Survey Form sheet with the compiled results represented that a significant majority of employees who provided feedback scored the survey process as "poor" in several performance categories. Nine respondents were reported to have scored the process as "poor" in response to the performance categories of "survey staff treated residents courteously and with respect," "opportunity was given to provide additional information relevant to deficiencies cited," and "as differences arose during the survey, they were resolved, or attempts were made to resolve them prior to the surveyor's departure." Twelve respondents were reported as having rated the survey as "poor" in the category of "survey staff treated staff courteously and with respect."

6. One of the seven written comments included in Ms. Entsminger's letter referred to one surveyor as having been very abrupt with staff. Two other comments referred to a resident who had become agitated by the questions asked during the survey without identifying the surveyor asking the questions.

7. Complainant was identified by Ms. Entsminger by name as having been the surveyor who held an inappropriate discussion concerning resident health conditions in the hallway with other residents and visitors nearby. Complainant was also identified by name as the surveyor described in three comments having to do with the provision of hospital records. From the way these three comments are presented in Ms. Entsminger's letter, it is not clear whether these are comments about several separate interactions involving hospital records or are three comments about one interaction. These comments refer to Complainant as having been "brusque and actually pretty rude," and as having been "rude to Medical Records Supervisor when not accepting the records." A seventh comment stated, "with the exception of one, (Barbara Pridemore) the other three surveyors were pleasant to me."

<u>Complaint- Colorado Health Care Association</u>:

8. On October 6, 2006, Respondent received a letter addressed to Dr. Mangione from

Arlene Miles, the President and CEO of the Colorado Health Care Association ("CHCA"). CHCA lobbies on behalf of the long term care industry in the state.

9. Ms. Miles stated that she was writing the letter on behalf of members of CHCA to "file an official letter of complaint against Barbara D. Pridemore, LPN..." Ms. Miles represented that she was writing the letter, rather than the involved CHCA member facilities, because of a fear of retaliation. Ms. Miles' letter also referenced that she understood that several facilities have also complained directly to Respondent about Complainant, and that members had expressed a concern about retaliation.

10. Ms. Mile's letter stated that she was providing examples of what CHCA's professional staff believed to be "inappropriate, rude and/or offensive behavior" by Complainant. The letter includes nineteen numbered paragraphs describing a variety of interactions attributed to Complainant.

11. The numbered paragraphs in Ms. Mile's letter do not identify specific facilities, specific surveys, or facility staff involved. Instead, many of the paragraphs include short statements identifying actions purportedly taken by Complainant. Ms. Miles alleged, for example: 1) that Complainant threatened to write a citation if information was not provided to her when, in fact, the information had been provided to her; 2) that she had asked for multiple copies of the same documents; 3) that she was "confrontational and belligerent" and had intimidated a charge nurse into changing her documentation on a patient; 4) that she had told a Director of Nursing to "please shut up;" 5) that she had caused a staff member to have chest pains by being "constantly argumentative;" and 6) that she had instructed two Certified Nurse Assistants not to replace oxygen tubing on a resident until the resident's pulse oxygen levels had been checked, which resulted in the resident not receiving oxygen for nearly five minutes.

12. The examples provided by Ms. Miles also included more general comments by facility staff, such as that Complainant's approach was one of distrust or that facility staff commented that they had never seen such a mean-spirited team as the one headed by Complainant.

Departmental Policy:

13. Respondent maintains an informal dispute resolution ("IDR") review program for nursing home facilities who wish to challenge violations noted by inspectors. The IDR process allows facilities to challenge specific violations and can result in changes to the results of the inspection process.

14. The IDR program does not address complaints which are unrelated to allegations of violations, and does not handle complaints concerning the conduct of surveyors.

15. At the time that Cambridge Care Center and CHCA filed their complaints about

Complainant's demeanor and actions during surveys, Respondent had no formal internal policy addressing how to handle complainants concerning the conduct of surveyors during site visits. Prior to the time that the Cambridge Care Center and CHCA complaints were filed, Respondent had been considering drafts of policies which would have implemented specific procedures to be followed in the event that allegations of unprofessional behavior are filed by outside parties against a surveyor.

16. Respondent did not formalize a policy concerning how such allegations were to be handled after Dr. Mangione was advised by her staff that the agency could simply use Board Rule 8-3 as its guide for handling such complaints.

Processing of the Complaints:

17. At the time of the receipt of the two complaint letters, Dr. Mangione was Complainant's appointing authority.

18. Dr. Mangione reviewed the two complaints. She contacted the author of the letter from CHCA, Ms. Miles, to discuss the issues and to ask Ms. Miles for assistance with specific information about the events described in the letter.

19. Ms. Miles initially hesitated to provide additional contact information to Dr. Mangione because she needed to contact the facilities which had provided information to ask them if they would be willing to be interviewed by Respondent.

20. Dr. Mangione assigned Long Term Care Program Manager, Nancy Lynch, the task of completing an investigation into the complaints. Ms. Lynch was Complainant's second-level supervisor.

21. At the time the investigation was initiated, Complainant was removed from Team Coordinator duties. Complainant was told that this action was taken because of the complaints which had been filed and were being investigated.

Investigation:

22. Ms. Lynch conducted an investigation into the two complaint letters. Ms. Lynch's first step was to gather information from Dr. Mangione as to which facilities referenced in the CHCA letter were willing to be interviewed about the allegations in the CHCA complaint.

23. Once Ms. Lynch had obtained the information about which facilities were willing to be interviewed, she conducted five phone interviews with six facility administrators or facility consultants. Four of these phone interviews were conducted between October 13, 2006 and October 20, 2006, and the final interview occurred on

December 6, 2006.

24. Ms. Lynch discovered that one of the facilities had included concerns about a survey which was conducted more than a year earlier than the complaint was filed. Ms. Lynch did not take those allegations into consideration because of the age of the issues.

25. Ms. Lynch also contacted Complainant's co-workers and asked them a series of questions concerning Complainant's performance. These interviews were held between October 18 and November 2, 2006. The questions asked of the other surveyors were:

    a. Describe what it's like working with Barb on survey. What do you like about working with her and why? What don't you like about working with her and why?
    b. Some feedback and complaints from facilities have spoken negatively about the central team in general, with statements such as "the team led by Barbara Pridemore was rude." What do you attribute this to and are you concerned that it may speak negatively of you?
    c. Have you observed Barb being rude towards residents? In what way? Have you ever observed Barb being too pushy or forceful with residents when questioning them about how they are treated by the facility?
    d. Have you observed Barb being rude towards facility staff?
    e. How would you describe Barb's technique or approach to interviewing facility staff?
    f. Do you think Barb is fair when she investigates concerns? Do you think that she takes all available information into account prior to making decisions?
    g. Is she willing to listen to the facility staff?
    h. How do you think facility staff perceive her? Is it possible they could perceive her as aggressive?
    i. Have you heard Barb talk negatively to facility staff about other facility staff or share inappropriate information with them?
    j. Has a staff member from a facility ever complained to you about Barb?
    k. How does Barb work within the survey team? When she is not [Team Coordinator] does she direct the team?
    l. Is there anything else that you would like to share?

26. Complainant was not interviewed as part of the investigative process into the allegations made in the two complaints.

27. Ms. Lynch tabulated the results of her interviews with the facility staff and the surveyors' answers to the questions posed of them, and presented that information

to Dr. Mangione.

Issuance of Corrective Action and Appeal:

28. Dr. Mangione left Respondent's office on or about December 4, 2006, and began working part-time for the Veterans Administration. As part of the arrangement that Dr. Mangione made shortly prior to her departure from Respondent's office, she arranged for John Schlue to become the Acting Director of the division.

29. Before she stopped working at Respondent's office, Dr. Mangione conferred with Ms. Lynch on the results of the investigation. Dr. Mangione authorized the issuance of a Corrective Action to Complainant based upon the results of Ms. Lynch's investigation. Ms. Lynch began drafting the Corrective Action based upon her understanding that the investigation had demonstrated that the facility allegations concerning Complaint's performance from facilities which were willing to speak with Ms. Lynch were, in large part, true.

30. Ms. Lynch scheduled a meeting with Complainant for December 14, 2006.

31. The meeting on December 14, 2006 was the first time that Ms. Lynch had spoken to Complainant about the allegations made against her performance. During the meeting, Complainant disputed that she had made many of the comments attributed to her in the complaints. Within a few hours after the conclusion of that meeting, Ms. Lynch presented Complainant with a Corrective Action.

32. Complainant filed a grievance concerning the issuance of the Corrective Action. Respondent denied Complainant any of the requested relief, and Complainant filed a timely appeal of the denial with the Board.

DISCUSSION

I. GENERAL

Under the Colorado Administrative Procedures Act, the "proponent of an order" bears the burden of proof at hearing. C.R.S. § 24-4-205(7). The "proponent of an order" is the person who brings forward a matter for litigation or action. *Velasquez v. Dept. of Higher Education*, 93 P.3d 540, 542 (Colo.App. 2003)(citing to *Dept. of Insts. v. Kinchen*, 886 P.2d 700 (Colo. 1994)). In challenges before the Board to personnel actions which are non-disciplinary in nature, the employee generally bears the burden of proof as the party who is bringing forward the matter for litigation. *See Harris v. State Board of Agriculture*, 968 P.2d 148, 151 (Colo. App. 1998)(holding that the employee bears the burden of proof that he or she has been constructively discharged); *Velasquez*, 93 P.3d at 544 (holding that the employee nears the burden of proof in a challenge to the abolishment of his position). *But see Kinchen*, 886 P.2d at702 and 704 (holding that, in a challenge to

disciplinary action, the appointing authority has "the burden of proof as to the factual basis for the disciplinary action," i.e., "whether misconduct occurred"). Given that this appeal is not of a disciplinary action by Respondent but a challenge to the procedure use to handle two external grievances against Complainant, Complainant bears the burden of proof in this matter. *Cf. Bourgeron v. City and County of Denver*, 159 P.3d 701, 706 (Colo.App. 2006)("When a party brings an action challenging an administrative decision, the burden of proof is on the party challenging the official action").

The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. C.R.S. § 24-50-103(6).

II. RESPONDENT'S MOTIONS TO DISMISS:

Respondent presented two sets of arguments requesting dismissal of this matter. During the hearing, Respondent argued that C.R.C.P. Rule 41(b) supported dismissal of the appeal at the conclusion of Complainant's presentation of evidence. This argument was denied at hearing; a summary of the arguments and reason for denial will be addressed below.

On March 4, 2008, Respondent also filed a Motion to Dismiss arguing that the Board did not have the jurisdiction to hear the case because of the language limiting Board review in C.R.S. §24-50-123 and that no remedy could be granted. Given the fact that this Motion was filed within a week of the hearing date, the issues were considered to constitute part of the Motion to Dismiss presented at hearing. A ruling on these substantive jurisdictional issues was reserved until the Initial Decision.

A. Sufficiency of the Evidence:

Respondent argues that, under the standards for C.R.C.P Rule 41(b) for a trial to the court, the "question on review is not whether the plaintiffs made a *prima facie* case, but whether a judgment in favor of the defendant was justified on the plaintiff's evidence." *Rowe v. Bowers*, 417 P.2d 503, 505 (Colo. 1966)(internal quotations and citations omitted). *See also Teodonno v. Bachman*, 404 P.2d 284, 285 (Colo. 1965)(same); *First Nat'l Bank of Denver v. Groussman*, 483 P.2d 398, 401 (Colo.App. 1971) ("However, when passing upon a motion for directed verdict where the court is also the trier of fact, then at the conclusion of plaintiffs' evidence, the trial judge may weigh the evidence, determine issues of credibility and reach all permissible inference, including those favoring defendants), *aff'm* 491 P.2d 1382 (Colo. 1971).[1] In Respondent's view, Complainant's case should be

[1] The Findings of Fact adopt a different understanding of the policy which had been produced to Complainant by Mr. Schlue (Complainant's Exhibit K). Once Respondent had introduced its evidence, the preponderance of the evidence supported that Exhibit K was merely a draft of a policy which had never been implemented by Respondent and that Respondent was following the requirements of Board Rule 8-3 without a policy interpretation of that rule. For purposes of C.R.C.P. Rule 41(b), however, the relevant question is the state of the evidence at the close of Complainant's case rather that at the end of the hearing.

dismissed under this standard because the evidence produced in the case-in-chief demonstrated that there was no adopted policy concerning "Professional Conduct" in existence and, therefore, no policy could have been violated.

The request for dismissal based upon the sufficiency of the evidence was denied at hearing because Complainant had produced sufficient evidence under at least one theory under which she could prevail.

First, Complainant had established that her appointing authority at the time that the December 14, 2006 Corrective Action was issued, John Schlue, had provided her with a copy of a "Professional Conduct" policy on departmental letterhead and without any notation that it was a draft policy (Complainant's Exhibit K) , and that he had provided the document to her because he wanted Complainant to follow the provision of the policy which required professional conduct by surveyors toward a complaining facility after a complaint had been filed. In addition, Ms. Lynch testified that the policy document produced to Complainant was probably considered during her investigation in this matter. Complainant also produced evidence that a February 2007 legislative audit of Respondent's operations by the State Auditor had determined that "CDPHE has a formal process for investigating written complaints concerning individual surveyors in accordance with State Personnel Board Rules [Rule 8-3]."

Second, Complainant established through Ms. Lynch's testimony that the complaints which were filed in this matter did not include specific information as to when and where the alleged conduct had occurred, the individuals involved, the contact information for those individuals and a detailed account of the allegations. Complainant also presented evidence that such details were required under the "Professional Conduct" policy.

Respondent is not entitled to judgment on such evidence,[2] and Respondent's C.R.C.P. Rule 41(b) motion based upon the sufficiency of the evidence was denied at hearing for that reason.

B. Lack of Remedy:

In its March 4, 2008 Motion to Dismiss, Respondent argues that the Board's limited grant for the hearing "preclude[s] any review of whether or not Mr. Schlue [who issued the corrective action to Complainant] consider the alleged 'professional conduct' policy information... or was even required to consider the information in [denying] Complainant's Board Rule 8-8 grievance." Respondent's Motion to Dismiss at page 4.

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[2] The Finding of Fact adopt a different understanding of the policy which had been produced to Complainant by Mr. Schlue (Exhibit K). Once Respondent had introduced its evidence, the preponderance of the evidence supported that Exhibit K was merely a draft of a policy which had never been implemented by Respondent and that Respondent was following the requirements of Board Rule 8-3 without a policy interpretation of that rule. For purposes of C.R.C.P. Rule 41(b), however, the relevant question is the state of the evidence at the close of Complainant's case rather than at the conclusion of the hearing.

Respondent further argues that the limited grant of a hearing also "preclude[s] any review of Mr. Schlue's action in denying Complainant's grievance," and "preclude[s] any review of action that would trigger §24-50-123." *Id.* As a result of these limitations, Respondent argues that the result is that "the Board cannot now find the agency's action was arbitrary, capricious or contrary to rule [or] law and order the removal of the corrective action, the relief requested by Complainant. No remedy can be granted by the Board in this matter." *Id.*

Respondent is correct that the Board's grant for the hearing was limited in scope. That limitation, however, was to examine whether or not Respondent followed the proper procedure in handling the two complaints filed against Complainant.

If the Board determines that there has been action by a state agency which is arbitrary, capricious or contrary to rule or law, C.R.S. § 24-50-123(6), then the Board has the ability to take appropriate action to reverse or modify the action. "[I]t is apparent that the Board is ultimately responsible for protecting the rights of public employees." *Hughes v. Dept. of Higher Education*, 934 P.2d 891, 893-4 (Colo.App. 1997). *See also* C.R.S. § 24-50103(6)("An action of the state personnel director or an appointing authority which is appealable to the board pursuant to this article or the state constitution may be reversed or modified on appeal to the board only if at least three members of the board find the action to have been arbitrary, capricious, or contrary to rule or law").

The Board's authority to remedy a violation is generally expressed as the return of the employee to the state existing prior to the violation. *See Dept. of Health v. Donahue*, 690 P.2d 243, 250 (Colo. 1984)(holding that "[a]ny remedy fashioned in this case should equal, to the extent practicable, the wrong actually sustained by Donahue" and finding that the proper remedy for the violation of the rules on predisciplinary meetings "restores Donahue to the position she would have been in if the flawed predisciplinary meeting had never occurred..."); *Beardsley v. Colorado State University*, 746 P.2d 1350, 1352 (Colo.App. 1987)(reversing a remedy granted by the Board on the grounds that the remedy chosen "'would place Beardsley in a better position that he would have occupied had he not been terminated improperly"). *See also deKoevend v. Board of Education*, 688 P.2d 219, 229-30(Colo. 1984)(approving a remedy in a challenge to an administrative action dismissing a teacher from employment which "restores the teacher to his status prior to the procedural error"). The Board must also be concerned with not choosing a remedy which produces "an economic windfall vastly disproportionate to the legal wrong" sustained. *Donahue*, 690 P.2d at 250.

The *Donahue/Beardsley* line of authority supports the proposition that the Board's remedy for a violation related to a fatally flawed investigation which violated the Board's rules on handling grievances should equal, to the extent practical, the wrong actually sustained by Complainant and which would restore Complainant to the position she would have been in if the investigation had not occurred. In this case, the December 14, 2006, Corrective Action was the direct result of the investigation results. Restoring Complainant

to the position she would have occupied had the investigation not occurred would mean that she would not have been issued the Corrective Action.

Respondent's argument that there is no remedy available to the Board does not take into the account the scope of the Board's authority to fashion an appropriate remedy under *Donahue* and *Beardsley*. Respondent's motion for dismissal based upon the lack of an available remedy is, accordingly, denied.

C. Lack of Jurisdiction:

Respondent also argues in its March 4, 2008 Motion To Dismiss that the Board is without jurisdiction to hear an appeal concerning how outside complaints are handled because its jurisdiction to hear appeals from grievances is limited.

Respondent acknowledges that the Board possesses constitutional authority to issue rules concerning the processing of grievances. *See* Colo. Const. Article XII, Section 14(3)("The state personnel board shall adopt....rules to implement the provisions of this section and sections 13 and 15 of this article...including but not limited to...grievance procedures"). Respondent contends that the Board exercised its authority in this area in adopting Board Rules 8-5 through 8-8, 4 CCR 801. These specific rules, however, apply only to the handling of employee complainants within the internal departmental grievance process, and are not applicable to how an agency handles complaints from individuals who are outside of the department. *See* Board Rule 8-3, 4 CCR 801.

Respondent notes that, in this appeal, the procedures implemented under Board Rule 8-3 are at issue, and not the procedures under Board Rule 8-8. Under Respondent's view, this presents a jurisdictional problem because C.R.S. § 24-50-123(3) restricts the Board's jurisdiction to hear grievance appeals to those appeals in which it appears that the appointing authority's decision has violated an employee's rights under the federal or state constitution, the state's prohibitions against discriminatory and unfair employment practices, the State Employee Protection Act, or of the grievance procedures adopted by the Board pursuant to C.R.S. § 24-50-123(1). Respondent argues that, because in its view Board Rule 8-3 is not a rule adopted pursuant to C.R.S. § 24-50-123(1), the Board cannot hear a case based upon an alleged violation of Board Rule 8-3 and should not have granted a hearing to Complainant to resolve this dispute.

Respondent's argument fails to consider that the handling of complaints from outside of the department is also a type of grievance procedure, and that the requirements of Board Rule 8-3 describe the handling of grievances from persons outside of the department. Board Rule 8-3 provides:

> Any person may file a complaint concerning a state employee's action. If the complaining party is an employee in the same department, the grievance procedure adopted by the department ... is to be used. If the complaining

> person is outside the department or the state personnel system, the person shall file a written complaint with the employee's appointing authority within a reasonable time period. The appointing authority will review a complaint and take the appropriate action, if any.

It is important to recognize that the Board's authority under the state constitution includes the ability to hear appeals from any action taken by an appointing authority after a person has filed written charges against a state employee accusing that employee of a failure to comply with standards of efficient service, willful misconduct or other possible grounds for discipline.

Colo. Const. Article XII Section 13(8) provides, in relevant part:

> A person certified to any class or position in the personnel system may be dismissed, suspended, or otherwise disciplined by the appointing authority upon written findings of failure to comply with standards of efficient service or competence, or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude, <u>or written charges thereof may be filed by any person with the appointing authority, which shall be promptly determined. Any action of the appointing authority taken under this subsection shall be subject to appeal to the state personnel board, with the right to be heard thereby in person or by counsel, or both</u>

This constitutional provision recognizes the right of "any person" to file written charges against certified employees alleging that the employee has committed acts which could constitute a basis for discipline, such as poor performance or willful misconduct. Once such charges are filed, an appointing authority has the duty under this provision to "promptly determine" the charges. More importantly for purposes of Respondent's argument, the provision also grants the Board the jurisdiction to hear appeals from "any action of the appointing authority taken under this subsection," which would include the action taken by an appointing authority in resolving the written charges filed by any person alleging a failure to comply with standards of efficient service or competence, willful misconduct, and the other causes for discipline under that subsection.

It is not surprising that the Board is authorized to review any action taken by an appointing authority to resolve charges filed against a certified employee. As this matter amply demonstrates, state employees can often be in a position of conflict with the individuals and entities that they regulate or otherwise directly affect as a part of their job duties. The process described in Art. XII, Section 13(8) creates a level of independent review by the Board, which helps to protect state employees from political interference in the evaluation of their work. *See Coopersmith v. City and County of Denver*, 399 P.2d 943, 948 (Colo. 1965) ("The purpose of civil service legislation is to protect employees from arbitrary and capricious political action and to insure employment during good behavior").

In deciding how written charges under Colo. Const. Art. XII, Section 14(6) are to be handled, the Board has implicitly recognized that complaints of employee misconduct, poor performance, or other potential grounds for discipline which are filed by co-workers or others are a type of grievance. *See* Board Rule 8-3 (mandating that, if there is a complaint filed by an employee in the same department, then the grievance procedures adopted by the department or, in the absence of internal procedures, under the terms of Board Rule 8-8 are to be used).

The Board has also recognized that such grievances should be handled in different ways, depending upon the source of the complaint. If the person filing the complaint and the individual being grieved are both within the same department, then Board Rule 8-3 mandates that the complaint be processed through the internal grievance procedures adopted by the department to apply the requirements of Board Rule 8-8. Board Rule 8-8, in turn, creates a two-step process which utilizes a supervisor or second-level supervisor at the first step of consideration, and then the department's appointing authority for the formal second stage of consideration.

If, however, the charges originate from an employee outside of the department or from someone outside of the state personnel system altogether, then such grievances are to be handled under the requirements of Board Rule 8-3 rather than under the procedures of Board Rule 8-8. Board Rule 8-3 places the responsibility for handling a written complaint directly with the appointing authority rather than creating a two-stage process of review, and the rule provides the appointing authority with the flexibility to take appropriate action in response, rather than to define a specific process for the appointing authority to follow in resolving the charges.

C.R.S. § 24-50-123(3) cannot be read in such a way as to contradict the right of state employees to appeal to the Board under Colo. Const. Article XII, Section 13(8) after an appointing authority has taken any action in response to charges of poor performance, misconduct, or other possible grounds for discipline. *See Harris v. Denver Post Corp.*, 123 P.3d 1166, 1170 (Colo. 2005)("Our duty is to effectuate the General Assembly's intent, giving all the words of the statutes their intended meaning, harmonizing potentially conflicting provisions, and resolving conflicts and ambiguities in a way that implements the legislature's purpose"). C.R.S. § 24-50-123(1) provides that the Board's rules "shall provide an orderly system of review for all grievances and shall define matters that are subject to such grievance procedures." The Board's decision to treat written complaints of poor performance, misconduct, and the like, as a type of grievance, either under Board Rule 8-8 for internal charges or under Board Rule 8-3 for external charges, harmonizes C.R.S. §24-50-123(3) with the rights granted state employees under Colo. Const. Art. XII, Section 13(8).

Accordingly, Respondent's argument that the Board lacks the jurisdiction to hear this appeal is rejected and Respondent's Motion to Dismiss on such grounds is denied.

III. HEARING ISSUES

A. Respondent's handling of the external grievances failed to include an interview with Complainant as part of the investigation and, therefore, was unreasonable under Board Rule 8-3 and was arbitrary, capricious or contrary to rule:

When the regulated community has a concern that it is not being treated fairly or professionally by a state employee and files a complaint about that individual, a regulating agency such as Respondent has several competing obligations to meet.

On one hand, as a regulatory agency, Respondent should be responsive to the regulated community and must establish and enforce professional standards of conduct for its surveyors. The regulated community may well reasonably be concerned that it would be subject to retaliation from surveyors once complaints are registered, and it is incumbent upon Respondent to ensure that retaliation is not occurring during surveys once complaints are received.

On the other hand, however, Respondent also needs to support good, effective work on the part of survey staff, even if the regulated community bands together to complain about that work. Surveyors have valid reason to be concerned that their willingness to issue deficiency notices may subject them to retaliatory complaints from the facilities that they regulate, and Respondent must ensure that such retaliation is not occurring.

An investigation focused upon the specific factual basis for any complaint is the key to meeting these competing objectives. An appointing authority who considers the allegations to be of the type which, if proven, could support disciplinary or corrective action against an employee, also requires an investigation which focuses on determining the historical facts of specific allegations rather that depending merely upon the opinions and conclusory statements of those involved.

Many of the allegations raised by CDHA and Cambridge Care Center appeared to be the types of allegations which could be proven or disproven through a factual investigation. The allegation that Complainant instructed two Certified Nursing Assistants ("CNAs") to delay providing oxygen is a good example of the type of allegation which may well result in a finding. This allegation constitutes a discrete incident for which Complainant could be asked to provide information as to the circumstances and description of what she said and did. There should be at least two CNAs (and possibly other eyewitnesses) who could confirm or deny that Complainant provided specific medical instructions concerning the giving of oxygen to a patient, as well as contemporaneous patient records which may corroborate or shed a different light on the subject of what Complainant said and did.

Even the allegations of rude behavior can be investigated on a factual level, rather than merely as a subjective conclusion. Rudeness can take many forms, such as tone of voice, physical presence and facial expressions, and specific language choices. Whether a particular interaction constitutes unprofessionally rude behavior can also depend heavily upon the circumstances of the interaction. A fact investigation will delve beneath the overarching opinions that people normally offer when speaking about such incidents, and will investigate the specific instances and reach a conclusion on specific incidents. Such an approach helps to keep investigations from devolving into unproductive arguments where one party voices one opinion and the other party argues the opposing conclusion.

An investigation designed to uncover the factual basis for a complaint may require only a few actions, or it may require the application of several investigative steps. The amount and the types of information to be developed will vary according to whether there are disputes of fact present in the versions presented by the involved parties. If, for example, Complainant agrees that she took the a specific actions described by one of the facilities, then there may be little need to investigate that specific factual allegation further before determining whether Complainant's conduct violated the applicable professional norms. If, however, Complainant disputes that she took such actions, further investigation would likely be required in order to reach a reasonable conclusion as to what occurred on specific incidents. Such resolution may include locating and interviewing the eyewitnesses to the event rather than depending upon second and third-hand accounts from facility managers, retrieving relevant records and other potentially corroborating materials, determining whether there are contemporaneous statements which support or contradict the witnesses' versions of events, and performing sufficient investigation to determine other credibility issues for the witnesses such as investigating the possible biases of the witnesses.

Once a sufficient informational basis is established to determine what occurred in a particular incident, then those actions can be compared to the professional norms applicable to Complainant's conduct and reasonable conclusions drawn as to whether Complainant's actions violated the standards of conduct for surveyors.

The procedure utilized in this investigation, however, failed to include any interview of Complainant as part of the investigative process. By the time, Ms. Lynch spoke to Complainant on December 14, 2006, the investigation was complete and Dr. Mangione and Ms. Lynch had already decided that they agreed with many of the allegations in the complaints concerning Complainant's surveys. They also agreed that the conduct described in the complaints warranted a Corrective Action.

Such a procedure is not a reasonable or appropriate way to conduct an inquiry to determine whether a state employee has violated applicable standards of conduct. The procedure employed by Ms. Lynch did not permit Complainant an opportunity to participate in the investigation. As a result, Ms. Lynch was not aware of which factual allegations had to be investigated at a deeper level than was possible by simply speaking with the facility administrators and consultants before deciding which allegations were true and should be

sustained.[3] Given that this investigative procedure was an inappropriate process for investigating a complaint of poor performance or misconduct, the procedure is contrary to Board Rule 8-3 which requires that the appointing authority take "appropriate action" on an external complaint against a state employee.[4]

Additionally, the failure to involve Complainant in the investigation of the complaints against her also creates an arbitrary or capricious result.

In determining whether an agency's decision is arbitrary or capricious, a court must determine 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). Given that Ms. Lynch did not obtain and, therefore, did not include Complainant's version of events in her investigation, Dr. Mangione made her decision to support the issuance of a Corrective Action knowing only one side of the story and without knowing if Complainant disputed all or part of the facilities' versions of events.

Failing to ask Complainant to participate in the investigation constitutes a failure to use reasonable diligence and care to procure the evidence that the agency is authorized to consider, *Lawley*, 36 P.3d at 1252, and constitutes an additional ground for the Board to reverse the decision of the appointing authority made on the basis of that flawed investigation.

As a result, the failure to involve Complainant in the investigation of the complaints filed by Cambridge Care Center and CHCA is both an arbitrary and capricious act, *Lawley*, 36 P.3d at 1252, and a violation of Board Rule 8-3 as an inappropriate action by the appointing authority.

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3 Ms. Lynch's use of the general inquiry to Complainant's co-workers served to gather information and opinions about how Complainant had conducted her survey work on a general basis, but is not a substitute for gathering sufficient factual information to prove or disprove the allegations made in the Cambridge Care Center and CHCA complaints.

4 Complainant also argued at hearing that the action taken was not by Complainant's appointing authority, and that the complaints were not resolved by Respondent quickly enough to meet the requirements of Colo. Const. Art.XII, Section 13(8). The facts of this case do not support these contentions. Complainant's appointing authority at the time the complaints arrived was Dr. Mangione, and Dr. Mangione decided that Ms. Lynch should conduct an investigation into the complaints and that the results of that investigation warranted a Corrective Action for Complainant. Additionally, the complaints arrived in October 2006 and were resolved by December 2006. This timeline is sufficient under the circumstances to meet the requirement that the appointing authority "promptly determine" the complaint.

B. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. C.R.S. § 24-50-125.5 and Board Rule 8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule 8-38(B)(3), 4 CCR 801.

Given the above findings of fact an award of attorney fees is not warranted. There was no persuasive evidence presented that Respondent's investigation, while incomplete, was conducted in bad faith or as a means of harassment. The investigation was also not frivolous; once Respondent received written complaints of the type sent by the Cambridge Care Center and HCHA, Respondent was obligated under Board Rule 8-3 to take some type of appropriate action. An investigation into Complainant's actions was appropriate given the allegations.

CONCLUSIONS OF LAW

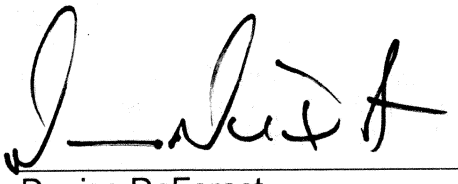
1. Respondent's action was arbitrary, capricious and contrary to rule or law.

2. Attorney's fees are not warranted.

ORDER

Respondent's Corrective Action of December 14, 2006 is **rescinded**. Attorney fees and costs are not awarded.

Dated this 19th day of May, 2008.



Denise DeForest
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

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. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is $50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee 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. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. 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 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 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. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must 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 ALJ's decision. Board Rule 8-65, 4 CCR 801.

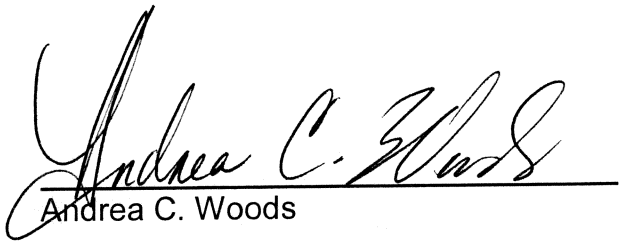
CERTIFICATE OF SERVICE

This is to certify that on the 20th day of May, 2008, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Teresa A. Zoltanski, Esq.
Colorado Public Employees Alliance
709 Clarkson St.
Denver, CO 80218

and in the interagency mail, to:

Eric Freund
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203



Andrea C. Woods

(rev'd. 5/07)