

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MARIA BERUMAN and DAWN ADAMS,
Complainants,

vs.

DEPARTMENT OF HUMAN SERVICES,
Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on July 20, 21, and 22, 2010, at the State Personnel Board, 633 17th Street, Denver, Colorado. The case was commenced on the record on April 20, 2010. The record was closed on August 10, 2010, following submission of written closing arguments and exhibits. Respondent appeared through Eric Freund, Assistant Attorney General. Respondent's advisory witness was Robert Gunn, Qualified Mental Retardation Professional (QMRP), Health Professional V, Wheat Ridge Regional Center (WRRRC), Colorado Department of Human Services (DHS or Respondent). Complainants appeared through Mark Schwane, Esquire.

MATTERS APPEALED

Complainants, Maria Beruman (Beruman or Complainant) and Dawn Adams (Adams or Complainant), appeal their disciplinary termination of employment by Respondent. Complainants seek reinstatement, back pay, benefits, and attorney fees and costs.

For the reasons set forth below, the actions of Respondent are **affirmed**.

PROCEDURAL BACKGROUND

Complainants moved to consolidate the cases. Respondent opposed the motion, asserting that the interests of Complainants might be adverse to each other. Complainants' counsel certified on the record that Complainants had signed written waivers of their right to separate trials. On April 18, 2010, the motion was granted and the cases were consolidated.

A protective order was issued so as to maintain the confidentiality of all residents of WRRRC.

ISSUES

1. Whether Complainants committed the acts for which they were disciplined;
2. Whether Respondent's disciplinary actions were arbitrary, capricious, or contrary to rule or law;
3. Whether the disciplinary actions imposed were within the range of reasonable alternatives available to the appointing authority; and
4. Whether Complainants are entitled to an award of attorney fees and costs.

FINDINGS OF FACT

General Background

1. Ms. Beruman worked as a certified Health Care Technician I at the 49th Place House (the House), which is part of WRRRC. She holds a Licensed Psychiatric Technician (LPT) license. (Stipulated Fact)
2. Ms. Adams worked as a certified Client Care Aide II with Ms. Beruman at the House. (Stipulated Fact) She started at the House in June 2007.
3. The House is a group home for eight male developmentally disabled residents.
4. Complainants held positions of trust, in which they worked with vulnerable clientele. Complainants' provision of care to residents was often unsupervised.
5. Robert Gunn, QMRP for the House, was the appointing authority for both Complainants.

WRRRC Protection from Harm Procedure

6. WRRRC Procedure III-A-5, Protection from Harm, states, "Each employee at the WRRRC has the responsibility to pro-actively protect all persons served by WRRRC." It provides, "The right to protection from harm includes the right to adequate living conditions, the right to protection from assaults by others, and the right to protection from self-inflicted injury."
7. The procedure states, "Protection from harm is defined as any incident that could result in physical injury or tissue damage, whether minor or severe, and includes, but is not limited to aggression, self-aggression, accidents, treatment errors, and exposure to hazards without adequate protection . . . Meeting this responsibility is a fundamental condition that must be met and is prerequisite to providing quality services. Failure to provide protection from harm could result in personnel action."

WRRC Abuse/Mistreatment/Neglect Exploitation Procedure

8. WRRC Procedure III-A-9 governs abuse, mistreatment, neglect, and exploitation (AMNE). Under this Procedure, it is the responsibility of all staff to protect persons receiving services from AMNE, and to report witnessed or suspected AMNE.
9. The procedure defines “physical abuse” as “the infliction of physical pain, injury, or the imposition of unreasonable confinement or restraint on a person receiving services. This includes, but is not limited to: striking, pushing, pulling, twisting body parts, restricting a person’s freedom of movement outside of appropriate, approved CAIT techniques and/or an ISSP, and directing a person to physically abuse another person receiving services.”
10. The Procedure defines “mistreatment” as “an act or omission, which threatens the health, safety or welfare of a person receiving services (where one might reasonably have expected harm to occur – probable vs. possible).”
11. The Procedure defines “neglect” as “an act or omission of an act by an employee . . . which denies a person receiving services adequate food, clothing, shelter, psychological care, physical care, medical care, or supervision.”
12. The Procedure provides, “Failure to report witnessed or suspected AMNE will be considered as serious as the act itself, and will result in appropriate disciplinary measures and possible legal action.”
13. Under Procedure III-A-9, “appropriately implemented and approved CAIT techniques” are not considered AMNE.

WRRC Incident Reporting Procedure

14. WRRC Procedure III-B-6, “Incident Reporting,” requires “accurate and timely verbal reporting and written documentation on the agency Incident Report form. The Incident Report provides a structure reporting system for effective agency review of harmful incidents/accidents/injuries, and the interventions and follow-up actions implemented.”
15. Reportable incidents include: injury to a person served (both known or unknown cause); unusual irregularities such as lumps or markings not previously noted; use of emergency control procedures and/or safety control procedures including physical restraints; allegations of abuse, mistreatment, neglect, or exploitation.
16. Any WRRC staff member who observes or becomes aware of a reportable incident must notify Health Services/Nursing, fill out an Incident Report form and fax it and all attachments to Quality Assurance (QA) by the end of the shift during which the incident occurred.

DHS Code of Conduct

17. The DHS Code of Conduct requires that all employees be truthful, honest, and courteous to co-workers and to customers at all times; accept responsibility for own mistakes; ask for clarification and guidance when unsure about job duties; and treat others as they wish to be treated.

Behavior Programs

18. Each House resident has a written Behavior Program (also known as an ISSP) which must be followed by staff. The Program describes in detail the type and frequency of problem Behaviors, effective Interventions, and Safety Control Procedures appropriate for each resident.
19. When a resident engages in problem Behaviors, House staff are required to use the Interventions prior to the Safety Control Procedures.

Client 1

20. Client 1 is a 27-year-old resident of the House, with diagnoses of Autism, Intermittent Explosive Disorder, Anxiety Disorder, and Adjustment Disorder. He has a moderate level of mental retardation. Client 1 has difficulty communicating and at times will refuse to talk.
21. According to Client 1's Behavior Program, he likes structure, has a great sense of humor, enjoys music, television, exercise, sharing "inside jokes with familiar people," writing letters, word puzzle books, and reading magazines.
22. Client 1's Behavior Program lists as its desired Goal that he "will learn and use safe ways to handle his anger."
23. The Behavior Program lists Client 1's Behaviors as "punching, throwing objects at others or through windows, smashing dishes, breaking personal property, breaking holes in walls, or any other action with the apparent intent or potential to hurt others." It indicates that he has 25 episodes per month based on data from Behavior Tracking Sheets in September 2009.
24. The Interventions listed as being effective to preempt aggression by Client 1 include keeping him busy with and redirecting him to activities he enjoys, providing structure, praising him frequently, encouraging him to share his feelings, avoiding power struggles, redirecting him to activities he enjoys, reminding him of his coping strategies, telling him to stop what he is doing, reassuring him that everything will be okay, asking him to calm down and relax, and giving him space as soon as he calms down.

25. The Intervention section of the Behavior Program states, "If none of the above interventions are successful in redirecting or calming Client 1, please refer to the Safety Control Procedure."

26. The Safety Control Procedure in the Behavior Program lists as its Goal, "To protect others from being injured by Client 1." It states,

If the approaches in his behavior program have not been successful in discouraging or distracting Client 1 from attempting aggression toward others and he begins to become aggressive, do the following:

- Call for assistance.
- Block Client 1's blows and tell him to STOP what he is doing.
- If he does not stop immediately, Client 1 needs to be approached from behind and placed in a standing PRT [physical restraint technique]. Someone may need to distract him from the front before the second staff places him in the CAIT hold [Colorado Approved Intervention Techniques]. The person in front needs to be careful not to get kicked.
- Client 1 kicks high and hard.
- Unless Client 1 calms quickly, which is unlikely, transition quickly into a sitting and then a lying down PRT.
- Assistance may be needed from others to hold Client 1's legs and hands.
- Call nursing and the house behavior specialist/psychologist [#] and apprise them of the situation so that they may evaluate Client 1.

27. WRRRC staff are trained in how to use approved PRT's on House residents.

28. When Client 1 is placed in a hold, he rubs his body into the floor and wriggles fiercely to get out of it. He also becomes aggressive towards himself and the individual restraining him, attempting to pinch and hit the restraining staff member.

29. Client 1 has no known history of lying to staff.

December 6, 2009

30. Both Complainants worked at the House on the day shift on December 6, 2009. (Stipulated Fact)

31. During the shift, Client 1 decided to do laundry. He entered the laundry room several times, opening the washing machines, moving his clothes around, and then departing.

32. After the door to the laundry room somehow became locked, Client 1 became upset about losing access to his clothes, fearing someone might take them. Ms. Beruman was present, and she informed Client 1 that she had a key. She helped Client 1 re-enter the laundry room.
33. Client 1 rearranged his clothes, causing them to become unbalanced in the washing machine. Ms. Beruman noticed the problem, waited until Client 1 left the room, and then rearranged Client 1's laundry in the washing machine.
34. While Ms. Beruman was in the laundry room for no longer than a few minutes, Client 1 was in the living room and threw Ms. Adams' cell phone.
35. As Ms. Beruman walked out of the laundry room, she heard Ms. Adams talking loudly in the living room area. When Ms. Beruman entered the living room area, she saw Ms. Adams on the floor with Client 1. Both Client 1 and Ms. Adams were lying on the floor on their sides, with Ms. Adams directly behind Client 1. Ms. Adams had one of her arms under Client 1's body, and the other looped through one of Client 1's arms, attempting to restrain him.
36. Ms. Beruman was concerned that Client 1 might scratch Ms. Adams, so she approached them and grabbed Client 1's available hand and held it, restraining him further.
37. During this restraint by Complainants, Client 1 cried and struggled on the rug and sustained injuries. Ms. Adams spoke to Client 1 quietly to try to calm him down.
38. Both Complainants used an unauthorized hold and restraint on Client 1. They did not use an approved CAIT hold or PRT.
39. Client 1 sustained a rug burn abrasion on his forehead, approximately 2 inches long by $\frac{3}{4}$ inches wide, near his hairline on his left forehead; a small bruise on his right forearm; and a rug burn abrasion on his left elbow approximately 1 by 2 inches in size. Rug burns are very painful and they take only seconds to generate.
40. Client 2 was present and watched as Client 1 threw Ms. Adams' phone and as Ms. Adams, and then Ms. Beruman, restrained and held down Client 1.
41. After Client 1 calmed down, he returned to his room. He became very sad and upset about his grandfather passing away and cried about it.
42. Client 1 requested a bath, and Ms. Adams gave him a bath to help calm him down.

43. During the last portion of the shift, Complainants attempted to verify when Client 1 had lost his grandfather. They eventually determined that his grandfather had not died recently.
44. Neither Ms. Beruman nor Ms. Adams completed an Incident Report for the incident with Client 1 when it occurred. Neither of them reported it to any supervisory, QA, or nursing staff.
45. At the end of the day shift, approximately 3:00 p.m., Ms. Adams mentioned to an oncoming staff member, Mark Delahunt, that she and Ms. Beruman had had to put Client 1 in a hold and he had a small mark on his head.
46. When Ms. Beruman gave the shift report to the oncoming LPT, Chris Whitmore, Ms. Beruman stated that Client 1 had been very sad and upset, sobbing about his grandfather passing away. Ms. Beruman also stated that he had been given a bath to calm him down.
47. At approximately 3:30 or 3:45 p.m., Client 1 approached Ms. Whitmore. His face was red and it appeared he had been crying. She asked if he was sad and having a tough day. He shook his head yes and gave her a hug.
48. Ms. Whitmore noticed the rug burn abrasion on Client 1's left forehead near the hairline at this time.

Client 2 Report of Incident

49. Client 2 is a WRRRC resident with strong verbal communication skills. He has no history of lying to House staff.
50. After dinner on December 6, 2009, Ms. Whitmore talked with Client 2 about how his day was going. Client 2 mentioned that he had had a good day, but that Client 1 had acted up earlier and had been placed in a hold. He stated that Client 1 had tried to scratch and bite Ms. Beruman.
51. Ms. Whitmore wrote an Incident Report on Client 1's injuries on December 6 at 9:30 p.m. The Incident Report stated in part, "Client 1 came out of his room and approached staff. First shift reported that he had been very distressed and crying. He told them his grandpa had died. His face was very red and blotchy. When asked he said he was upset and gave staff a hug. Noticed what appears to be an abrasion about 2" long on his left forehead near the hairline. Nothing was written as to how it may have occurred."
52. At 10:10 p.m. on December 6, 2009, Ms. Whitmore called and informed the nurse, Suzann Lucas, about Client 1's injury and that she had completed the Incident Report.

53. Anna Aguilar-Gomez was the Residential Coordinator for the House, with supervisory authority over all nine or ten staff. Ms. Aguilar-Gomez called the House every evening to check in and see if any issues needed her attention. When she called the House on Sunday evening, December 6, between 8:00 and 9:30 p.m., Ms. Whitmore informed Ms. Aguilar-Gomez of Client 2's report and Client 1's injuries.

December 7, 2009

54. On December 7, 2009, when Ms. Aguilar-Gomez arrived at work, she examined Client 1 and confirmed he had the injuries on his forehead and arm. She then spoke to Client 2, who reported that Complainants put Client 1 in a hold because he was acting up. She asked Ms. Adams if she knew how Client 1 had been injured, and Ms. Adams stated that nothing had happened.
55. Ms. Aguilar-Gomez then called the QA division of WRRC and left a message on its reporting line regarding the restraint/hold and injury on Client 1, the report from Client 2, and the lack of any Incident Report by Complainants.
56. Ms. Aguilar-Gomez also arranged to have the nurse, Michelle Ohnemus, RN, examine Client 1, on December 8, 2009. Ms. Ohnemus took photographs of Client 1's injuries while Ms. Aguilar-Gomez was present.
57. Cathy Stopfer works in the DHS Division of Mental Disabilities, Program Quality Unit, as Director of the QA Department for WRRC. She supervises two QA investigators. Ms. Stopfer called Ms. Aguilar-Gomez back to take the report, and assigned the investigation of the Client 1 incident to herself.
58. Ms. Aguilar-Gomez also contacted the Jefferson County Sheriff's office regarding the potential assault to Client 1, in accordance with WRRC policy.
59. On December 7, 2009, Ms. Adams filled out a "Residential Note" form on Client 1, noting that Client 1 was upset about his grandfather dying, that she asked him if he would like a bath to relax. She indicated that he said he would like that, that she gave him a bath, and that afterwards he felt much better, his mood was much better, but that his face and eyes were swollen and red from crying.
60. Both Complainants were placed on paid administrative leave pending the investigation of the incident.

QA Investigation

61. On December 7, 2009, at approximately 3:00 p.m., Ms. Stopfer visited the House to interview Clients 1 and 2.

62. Ms. Stopfer met with Client 1 alone in his room. She immediately noticed his abrasion on his forehead and asked him how he got it. He said nothing. She asked if he had fallen. He shook his head, "No." She asked if he was in a hold, and he shook his head, "Yes." She asked if he was held on the linoleum, and he shook his head, "No." She asked if he was held on carpet and he shook his head, "Yes." She asked him to show her where this had happened. Client 1 got up and ran out of his room and pointed to a spot on the living room carpet between the television and the laundry room.
63. Ms. Stopfer asked Client 1 who had held him. He stated, "Marie" [Beruman]. She asked if anyone else had held him and he stated, "Dawn" [Adams]. She asked him if it was from "today" and he shook his head, "No." She asked if it was from yesterday, and he shook his head, "Yes."
64. Client 1 ran back to his room. Ms. Stopfer asked if he would answer any more questions, and he shook his head, "No."
65. Ms. Stopfer then met with Client 2 alone. She asked him if he knew how Client 1 got his injuries. Client 2 stated that "Maria and Dawn took him down" yesterday. He stated it happened after lunch and it was just Client 1, Ms. Beruman and Ms. Adams in the living room. He said that Client 1 was wandering around between his room and the laundry room and he picked up Ms. Adams' phone and threw it. He stated that Client 1 "scared me by throwing the phone – he was down until he calmed down."
66. Client 2 then took Ms. Stopfer over to the exact same spot Client 1 had shown her, to demonstrate where it had occurred. Client 2 had not been present when Client 1 had shown Ms. Stopfer the location.
67. When Ms. Stopfer asked Client 2 why Client 1 was put in a hold, he responded he would rather not say anything about that. He stated that Client 1 was mad at Ms. Beruman and bit her and it broke the skin. He stated, "I didn't see it but he broke the skin."
68. Ms. Stopfer was aware that Client 2 was capable of writing a statement, but she did not request one.

Police Investigation

69. Sheriff's Investigator Daniel Manka visited the House on December 8, 2009. He spoke with Ms. Stopfer, who agreed to permit him to speak with Clients 1 and 2. Both Ms. Stopfer and Ms. Aguilar-Gomez were present when he spoke with them.

70. Officer Manka spoke with Client 2 first. He asked Client 2 some preliminary questions about his surroundings and the staff at the house, and determined that Client 2 was aware of "linear time and what was going on." Officer Manka then asked about the events on December 6, 2009. Client 2 reported that Client 1 became upset after lunch, was running around the house yelling, and then picked up Ms. Adams' phone and threw it. After this, Client 1 was restrained and placed in a hold by Ms. Adams and Ms. Beruman for "about 30 minutes." Client 2 stated that they let him go after he calmed down and that Ms. Adams was talking "real nice" to Client 1 to help him calm down and told him if he ever needed anything just to let her know. Client 2 walked Officer Manka over to the living room area where the hold occurred and stated that Client 1 had bit Ms. Adams on the arm and scratched Ms. Beruman while they were holding him down.
71. Officer Manka attempted to interview Client 1, but Client 1 would not cooperate.
72. Officer Manka and Officer Paul Magor then visited Ms. Adams at her home to interview her. She denied having restrained Client 1 at any time and stated that he had been upset on Sunday, so she had given him a bath to calm him down.
73. Ms. Adams showed the officers her arms and there were no marks or injuries. She showed them her cell phone and it had no visible damage.
74. On December 10, 2009, Darcie Meierbachtol, a Nurse Practitioner, examined Client 1. She documented his three injuries, all of which were healing at the same rate, indicating they had occurred at the same time. She estimated they were 3 to 7 days old.

December 11, 2009 Interview of Ms. Beruman

75. The Jefferson County Sheriff's Office investigator, Officer Thomas Acierno, spoke with Ms. Stopfer on the telephone, and they decided to coordinate their investigations. They determined that Ms. Stopfer would conduct the interviews with the Complainants.
76. On December 11, 2009, Ms. Stopfer and Officer Acierno interviewed Ms. Beruman. At the outset of the meeting, Officer Acierno explained to Ms. Beruman that Ms. Stopfer and he were conducting the interview in tandem, with him investigating the possible criminal side and Ms. Stopfer conducting an internal investigation for the possibility of policy violations. He next advised Ms. Beruman that she was not in custody or under arrest, she did not have to speak with him, and she could stop the interview at any time.
77. Ms. Stopfer informed Ms. Beruman that they were investigating injuries to Client 1. She stated that Client 1's rug burns were consistent with a person who had been placed in a hold, but that there had been no incident reports concerning a hold, as required by policy.

78. Ms. Stopfer then informed Ms. Beruman of what Clients 1 and 2 had reported to her. Ms. Beruman responded by stating that on December 6, 2009, Client 1 had had a very rough day and had cried a lot because he thought his grandfather had died. She denied that a hold had been performed on Client 1 because he was "not misbehaving, he was just sad." She stated she was not aware of anything he had done that day that could have caused the rug burns to his body. She stated that Ms. Adams had given him a bath just before shift change.
79. Ms. Beruman stated that she did not believe Client 1 would lie, or that he was able to coerce someone to lie for him about a hold.

December 14, 2009 Interview of Ms. Adams

80. On December 14, 2009, Ms. Stopfer and Officer Acierno interviewed Ms. Adams. At the outset of the meeting, Officer Acierno gave Ms. Adams the same advisement he had given to Ms. Beruman. In addition, Ms. Stopfer informed Ms. Adams that they were investigating injuries to Client 1, and described what Clients 1 and 2 had reported.
81. Ms. Adams gave a report similar to that of Ms. Beruman, stating he was very upset about his grandfather and had been crying, and that she decided to give him his bath early. She stated that the bath was given just prior to evening shift and that she did not see any abrasion on Client 1's forehead at that time. She denied any knowledge of how Client 1 would have sustained injuries, and denied that she or Ms. Beruman had placed Client 1 in a hold that day.
82. Ms. Adams also stated that she did not believe Client 1 would lie, or that he was able to coerce someone to lie for him about a hold.
83. On December 14, 2009, at Ms. Stopfer's request, Ms. Whitmore wrote an Investigation Witness Statement concerning her shift on December 6, 2009. She noted that "Client 1 approached me about 3:30 – 3:45. It appeared he had been crying. His face was red and blotchy and he had tears in his eye. I asked if he was sad and having a tough day. He shook his head yes and gave me a hug. I noticed an abrasion on his left forehead near the hairline. . . I did an incident report and informed Suzann Lucas our nurse that one had been done. Relayed the scrape was about 2 inches long."

December 16, 2009 Interviews of Mr. Delahunt and others

84. Ms. Stopfer interviewed another staff member, Mark Delahunt, on December 16, 2009. He stated that he recalled working on December 6 and arriving to work before the other second shift staff. He said he asked Ms. Adams how the day went and she told him it was all right except they had had to put Client 1 in a hold. He indicated he had not thought much of this because Client 1 had been in

holds before. Ms. Stopfer asked him to write a statement, and as he did so, he recalled that Ms. Adams had mentioned that Client 1 had a little mark on his head from the hold.

85. Mr. Delahunt also informed Ms. Stopfer that he had mentioned Ms. Adams' statement about the hold to Ms. Whitmore during their shift. Ms. Stopfer followed up by asking Ms. Whitmore if she recalled his statement about the hold. Ms. Whitmore stated she did not and it may have been during medication administration, when she is very focused.
86. Mr. Delahunt stated that he first noticed Client 1's abrasion on his forehead during dinner, at approximately 7:00 p.m., on December 6, 2009. He also informed Ms. Stopfer that he had put Client 1 in holds in the past and that Client 1 rubs his body onto the floor and wriggles fiercely to get out of holds. He said he had seen similar marks on Client 1 after holds but they don't usually last or scab over like this one did.
87. All staff interviewed by Ms. Stopfer agreed that when Client 1 has an injury he will rub at it and recently caused himself to have an eye infection because of his rubbing of the injury.

December 21, 2009 Interview of Ms. Beruman; Written Statement

88. On December 21, 2009, Ms. Stopfer returned to the House. She informed Ms. Beruman that Mr. Delahunt had reported that Ms. Adams had told him about placing Client 1 in a hold at shift change; therefore, Ms. Beruman "might as well just tell her what happened."
89. Ms. Beruman then gave a lengthy and detailed explanation of what had occurred on that day, including: Client 1 was doing his laundry and became upset when the door locked; Ms. Beruman had unlocked the door to the laundry room for him; after rearranging his clothing in the washing machine, Ms. Beruman left the laundry room and entered the living room, finding Client 1 and Ms. Adams on the floor together; Ms. Adams was almost lying down beside Client 1 with one hand (her right arm) under Client 1 and her left arm looped into Client 1's right arm; Ms. Beruman thought that Client 1 would scratch and pinch Ms. Adams so she took hold of his hand and moved it away from Ms. Adams' hand and held it briefly; then, she and Ms. Adams backed away from Client 1 because if you try to hold him he struggles and escalates.
90. Ms. Beruman also informed Ms. Stopfer that Ms. Beruman had remained standing and Client 1's head was by her feet and she was watching his head because it was close to the entertainment center and other furniture. She stated she did not see if Ms. Adams had a hold on Client 1 but heard a thump, thump sound of his feet banging against the floor. Ms. Beruman stated it would not surprise her if Ms. Adams tried to hold his legs down and he kicks hard.

91. Ms. Beruman reported to Ms. Stopfer that Client 1 was rubbing his face into the carpet and trying to bite the carpet, "flopping around on the floor," and rubbing his arms back and his whole body into the carpet. She stated she thought that anything they would try to do to intervene would just make things worse so they waited for him to calm down. During this time, Client 1 was crying and yelling that he hated them and they were his enemies. Ms. Adams spoke to Client 1 quietly. Ms. Beruman stated it took about ten to twenty minutes for Client 1 to calm down.
92. Ms. Stopfer asked Ms. Beruman why she had not shared this information previously, since she was admitting that it was likely that this is how Client 1 sustained his injuries. Ms. Beruman stated she became scared when she met with the investigator and the detective. Ms. Beruman stated that although she had not seen Ms. Adams use a PRT she should have written in the potential injury log that this had occurred.
93. Ms. Beruman stated that because the hold used on Client 1 was less than a normal hold, they did not write an incident report.
94. Ms. Stopfer asked Ms. Beruman to write a statement of this account of what occurred on December 6, 2009. She did so with Ms. Stopfer present, stating in part:

I stayed in the laundry room to put Client 1's clothes in washer evenly. I herd (sic) Dawn's voice I went to see if she was okay. I saw Client 1 & Dawn on the floor. Client 1 on his side, Dawn kneeling. It looked like Client 1 was pinching or holding on to Dawn's left arm. I grabbed his right arm. Client 1 began twisting his body on the floor I made sure he did not hit his head on the furniture. I was watching his head. He rubbed his head on the carpet, it did not look like he was hurting himself. His face was red, he moved around for a few more seconds, then Dawn asked him if he was done. He shook his head yes when he got up he had tears in his eyes & went back to his room. Came out a few minutes later had a paper with address labels on it, then was sobbing, said, "my grandpa died." I asked him to sit at the table.

95. Ms. Beruman testified at hearing that this statement was written at the behest of Ms. Stopfer, who told her what to write, and that Ms. Stopfer rejected a first draft of her statement and forced her to write a second statement which was admitted at hearing. This testimony is not credible for several reasons. First, the statement is consistent with the reports of Clients 1 and 2. Second, Ms. Beruman never complained about such alleged coercion by Ms. Stopfer at any time after December 21, 2009, including in the predisciplinary meeting or on her appeal form, until the day of trial. Third, it is found that Ms. Stopfer would not

engage in such investigative misconduct because she was a credible witness. Ms. Beruman also testified at hearing that she was writing this statement "from the perspective of Client 2." This testimony is also not credible and it makes no sense.

96. After this meeting, Ms. Stopfer called Officer Acierno on December 22, 2009. She informed him that because Complainants had violated policy by not writing an incident report concerning the hold performed on Client 1, and by providing false statements during the interviews, they would both be terminated. Ms. Stopfer based these statements on her knowledge of WRRRC's zero tolerance policy for physical abuse. Officer Acierno concluded that because they were losing their jobs, and because there was not enough evidence to prove that they acted knowingly or recklessly when Client 1 sustained his injuries, in the interests of justice, the criminal case would be closed. He then closed the case and no criminal charges were filed.

December 21, 2009 Interview of Ms. Adams

97. Ms. Stopfer also met with Ms. Adams on December 21, 2009, informing her of Mr. Delahunt's statements. Ms. Adams continued to deny any knowledge of how Client 1 might have sustained his injuries on December 6, 2009. She wrote a statement describing Client 1 as being extremely upset about his grandfather dying, and her bathing of Client 1.

QA Report

98. On December 21, 2009, Ms. Stopfer issued her final report concluding that her investigation substantiated the allegation that Ms. Beruman and Ms. Adams had engaged in physical abuse of Client 1.
99. Ms. Stopfer discussed the credibility of the reporting witnesses, noting that Mr. Delahunt had no reason to make up his statement; that Clients 1 and 2 had no known history of lying and no reason to make up their statements; and that Ms. Beruman had changed her account of what occurred on December 21, 2009.
100. Discussing Ms. Beruman's December 21, 2009 account in her report, Ms. Stopfer stated that it

gives ample evidence that the struggle on the floor with Client 1 on this date resulted in his rug burn injuries. Although Maria admitted she and Dawn physically restrained Client 1 on this day, in the exact location identified by Client 2 and Client 1, she minimized the restraint, saying she held one hand for just a moment and Dawn also held Client 1's arm for only a moment and that Client 1 was flopping around on the floor, rubbing around on the floor, and trying to bite the floor after they had released the restraint. This is difficult

to believe due to the reports from Client 1 and Client 2 and Mark Delahunt and reports from other staff who state Client 1 typically struggles a great deal when being physically restrained. It is likely Dawn and Maria restrained Client 1 for some time and Client 1 was struggling to get out of the restraint thus receiving the rug burns to his forehead, right wrist and left elbow.

101. Ms. Stopfer concluded:

The element of RECKLESSLY is met because, if we believe Maria's second account of this incident they allowed [Client 1] to rub his face into the carpet to the extent that he was injured. It is more likely that he was in a hold that neither [Ms. Adams] nor Maria has admitted to. This poses a significant concern about their ability to be trusted in their unsupervised interactions with residents. . . . the fact that Maria and [Ms. Adams] both adamantly denied restraining [Client 1] or having any knowledge as to how he could have sustained his abrasions when interviewed by the investigator and the detective from the Sheriff's Department makes one question WHY they would lie. It is likely they lied to cover up inappropriately managing Client 1's behavior, thus at least RECKLESSLY causing him injury even if not INTENTIONALLY. The element of BODILY INJURY is met because of the abrasions that [Client 1] received during this incident.

102. The QA report also concluded that Complainants violated WRRRC Procedure III-B-6 by failing to complete an incident report as required for all physical restraints. It noted that reportable incidents include injury to a person served (both known or unknown cause) and use of physical restraint.
103. The QA report made no reference to the lack of damage to Ms. Adams' cell phone and the lack of bite marks on Ms. Adams.
104. Ms. Stopfer forwarded her QA report to the WRRRC Management Committee and to Mr. Robert Gunn, Complainants' appointing authority.
105. Mr. Gunn is the QMRP at the House. His duties are to supervise all staff, manage the care provided to the residents and ensure the individual needs of the residents are being met, ensure the safety, security and welfare of the residents, and ensure that training objectives are in place and are being met.
106. Mr. Gunn had been at WRRRC for a year and a half at this time, having moved to Colorado from another QMRP position out of state. He had never imposed disciplinary action on an employee in the Colorado personnel system before.

107. Ken Kaiser is the Program Services Director for WRRC and Mr. Gunn's direct supervisor. Mr. Kaiser acted as a mentor to guide Mr. Gunn through the predisciplinary and disciplinary process, assuring that he knew and followed all applicable policies, rules, and procedures.

Management Committee Meeting

108. The QA report was listed as an agenda item at the next WRRC Management Committee Meeting. Ms. Stopfer presented her report and her findings to the Committee. The members discussed the report and assigned it to the team member for the House, Mr. Kaiser, to see that appropriate personnel action was taken.
109. Ms. Stopfer discussed her report with Mr. Kaiser. She expressed her concern about Complainants returning to WRRC, because she believed neither of them could be trusted.
110. Mr. Kaiser's duty as the Management Team liaison in the personnel action taken was to assure consistency in discipline imposed.
111. Mr. Gunn decided to notice both Complainants for predisciplinary meetings.

Notice of Predisciplinary Meetings

112. Mr. Kaiser directed his assistant to draft a notice of predisciplinary meeting to both Complainants. She printed two separate December 24, 2009 memos, to Ms. Adams and Ms. Beruman, from Mr. Gunn, noticing a pre-disciplinary meeting on January 5, 2010. Mr. Gunn signed both memos.
113. Mr. Kaiser directed his assistant to mail the signed memos. He did not follow up to confirm that they had been received.
114. Neither Complainant received the notice of predisciplinary meeting.
115. Mr. Gunn inquired of Mr. Kaiser's assistant as to whether return receipts had been received for the notice of predisciplinary meeting memos. He learned that they had not.
116. In late December 2009, Mr. Gunn called Ms. Beruman and spoke with her on the telephone to inform her of the predisciplinary meeting, providing the date, time, and place of the meeting. She confirmed her intent to attend.
117. In late December 2009, Mr. Gunn left a message on Ms. Adams' telephone machine, to inform her of the predisciplinary meeting, providing the date, time, and place of the meeting. Ms. Adams left a message for Mr. Gunn confirming

receipt of his message and that she would attend the meeting on January 5, 2010.

118. Mr. Gunn did not inform Complainants of their right to have a representative at the predisciplinary meeting.
119. Prior to the predisciplinary meetings, Mr. Kaiser and Mr. Gunn agreed that Mr. Kaiser would run the first meeting with Ms. Beruman because Mr. Gunn had never conducted a predisciplinary meeting before. Mr. Kaiser was to model how a predisciplinary meeting should be conducted. They also agreed that both Mr. Gunn and Mr. Kaiser could ask questions of Ms. Beruman. Then, Mr. Gunn would conduct the second meeting, with Ms. Adams.

Predisciplinary Meeting of Ms. Beruman

120. Ms. Beruman attended her January 5, 2010 predisciplinary meeting without a representative.
121. At the outset of the meeting, Mr. Kaiser read State Personnel Board Rule 6-10 to Complainant. He invited her to ask questions about the purpose of the meeting or about Rule 6-10. She had no questions about the purpose of the meeting and made no statements about not having been given adequate notice of the meeting.
122. Mr. Kaiser asked Ms. Beruman if she knew the subject matter of the meeting. She confirmed that she did.
123. Mr. Kaiser then asked her to recount what she remembered about December 6, 2009, with Client 1. She stated that she was surprised that Client 1 was in such emotional distress that day, but it was not his normal laundry day and he was paranoid about someone taking his clothes. She indicated that when she left the laundry room after balancing his clothes in the washing machine, she heard Ms. Adams, who was on the floor.
124. Ms. Beruman described Client 1 on the floor for two or three minutes at the most and Ms. Adams "just trying to make sure he doesn't hurt himself, because he just starts kicking." She stated "with Client 1, we don't just jump in and put him in a hold, because it makes it worse. He escalates, and then we have a behavior that turns into much more restraint, like a hold, which we never put him in a hold. And I could see why another resident thought he was in a hold, I could see that, because he was on the floor and we were both there. I was standing up and I was making sure that he wasn't hitting his head on the furniture. That's what I was afraid of. And he tried to hit me a couple times. He didn't hit me. But, you know, he was just really upset. And he tried to bite at me, but he never bit me."

125. Ms. Beruman stated that once he got his aggression out, Client 1 got up and they ended it by not talking about it.
126. Ms. Beruman stated that Client 1 did not look like he was hurting himself and she did not see any injury on him, but his face was very red from crying.
127. She also stated that Client 1 “has little fits like that over simple -- I mean he does it two, three times a day on average. Some days are more, it just depends.” She suggested using a behavior tracking form similar to that used for another resident, instead of just relying on incident reports. She stated, “if we have to write an incident report every time he does that, we’re going to have incident reports all the time. I know that doesn’t look good for auditors.”
128. Mr. Kaiser pointed out that in her prior interview with QA, Ms. Beruman had said that Client 1 was sad, was not misbehaving, and had not tried to bite or hit her. She responded, “when I originally talked to her, I was – at first I thought it was about Client 4, because he was the only hold. I had no idea what it was about.” She also said that when she met with Ms. Stopfer and the police officer, “and they’re talking abuse, I was like, oh, my goodness. It just snowballed into this big thing.”
129. Mr. Kaiser asked Ms. Beruman to clarify her statements about what Ms. Adams was doing with Client 1 when he was on the floor. She stated, “she was trying to lock his feet and make sure he wasn’t kicking anything. And then from my view, it looked like he might be pinching or something, so I made sure his arm—you know, I grabbed his arm away, because it looked like he was pinching her.”
130. Mr. Kaiser asked her why, since both she and Ms. Adams had touched Client 1, they had not generated incident reports. She responded that it happens so many times a day and “most of the time he never gets hurt. He’ll just get up.” She stated that if he had not gotten any rug burns, no one would be saying anything about it.
131. During the meeting, Ms. Beruman agreed that she should have filled out an incident report and called a nurse during her shift on December 6, 2009.

Predisciplinary Meeting with Ms. Adams

132. Ms. Adams appeared for her predisciplinary meeting on January 5, 2010 without a representative. Mr. Gunn opened the meeting by reading Board Rule 6-10. He asked her if she understood all of what he had read.
133. Ms. Adams responded, “Yeah. I didn’t know anything about the representation, but I don’t have a lot to hide, so it doesn’t really matter.” Ms. Adams made this statement quickly; at the same time, Ms. Gunn said, “Well, and you, you, you.”

Ms. Adams said nothing additional about the right to a representative during the meeting.

134. Ms. Adams stated she knew the purpose of the meeting was to discuss the December 6, 2009 incident with Client 1. Asked to describe what had occurred, she said it was a normal day until Client 1 emerged from his room very upset, sobbing, which she had never seen him do. He then had snack and returned to his room. Ms. Adams followed him to talk and offered to give him a bath, which she did.
135. After Mr. Gunn asked her several questions about the day, he asked Ms. Adams, "was there anywhere in here that for some reason you had to put Client 1 in a hold?" She responded, "No. No. Usually we try very – with Client 1 we've learned it's much easier to nip it in a bud real fast and get his mind going in a different direction, redirect him as fast as you can. Because the longer you let him build up on something he's angry about, the more likely you're going to come down to a hold. He did do a little crawling around, but he does that – I don't know."
136. Mr. Gunn asked, "Crawling around where?" She responded that he was crawling around on the floor and that he does that when he tries to burrow under furniture.
137. Mr. Gunn asked more questions, and she responded that it was in the living room. "Nothing too dangerous. I mean nothing – of course, you just stay with him. I think I may have even sat down beside him. Oh, I think we played take the ears, and I don't know if you've seen us do that." She described the game as pretending to take his ears, running with them or hiding them or throwing them and he goes to get them, and then Client 1 reciprocates.
138. Ms. Adams stated that Client 1 was not angry or emotional at the time he was on the floor playing "take the ears" with her. She denied that Client 1 threw her cell phone.
139. Mr. Gunn asked if Ms. Beruman was nearby while they played the game. She stated, "She could have been standing by. Usually in that situation, you know, if you're trying to calm Client 1 down and redirect him, you don't want to take your eyes off him for too long. . . Honestly, I could not tell you if she was standing in the vicinity or not, because I – my focus was on Client 1."
140. Mr. Gunn asked if Client 1's face was red because of his crying. Ms. Adams stated that it was because of that and due to Client 1's sensitive skin. She stated, "His little cheeks are always red sometimes. His nose is always red. But because of his crying, his eyes were literally swollen. And his face was just bright red."

141. Mr. Gunn asked Ms. Adams if there was any time she had put her hands on Client 1 to restrain him. She responded, "No, I didn't put my hands on him maliciously in any way besides probably put my arms around him and hug him."
142. At the end of the meeting, Mr. Gunn informed Ms. Adams of what Ms. Beruman had reported she had seen: Client 1 on the ground with Ms. Adams down beside him with one hand under him and the other looped into his right arm; and, because Ms. Beruman thought Client 1 was going to scratch and pinch Ms. Adams, she took his hands and moved them away from Ms. Adams' hands and held them briefly.
143. Ms. Adams responded that she had had no physical contact other than playing "take your nose, take your ear." She also denied having seen Ms. Beruman have any physical contact with Client 1.
144. Mr. Gunn also stated that Ms. Beruman had reported Client 1 being really upset on the floor, rubbing his face on the carpet trying to bite the carpet, flopping around. Ms. Adams stated, "Yeah, he does that all the time when he gets down" on any floor surface, including on the bus, when something has upset him. Mr. Gunn asked if he ever gets hurt doing that. Ms. Adams stated that he did.
145. Mr. Kaiser asked Ms. Adams why she had stated to QA that she had no idea of how he could have gotten the rug burn on his head. She responded that she had not seen him do it and that he does it so often, they were told to use their own judgment on writing up the behavior. She stated, "if we were constantly writing up every time he got mad or – and got down on the ground or . . . hit himself on the head, we'd be constantly writing NCR notes and not be able to do our jobs or IR's (Incident Reports)."

Termination of Ms. Beruman

146. Mr. Gunn wrote the termination letter drafts and asked for input from Mr. Kaiser. Mr. Kaiser suggested that more factual detail be included in the letters.
147. On January 8, 2010, Mr. Gunn issued the letter terminating Ms. Beruman's employment. Mr. Gunn first outlined the three very different descriptions of the events on December 6, 2009, finding that she lacked credibility. He noted that Clients 1 and 2 had reported that she and Ms. Adams placed Client 1 in a hold because he was angry and acting out and that Ms. Beruman held him down until he was calm; Mr. Gunn stated that he had no reason to believe that the residents' reports were not true. He also cited the statement by Mr. Delahunt that Ms. Adams had reported at shift change they placed Client 1 in a hold and he had a mark. Again, Mr. Gunn indicated he had no reason to believe that Mr. Delahunt would make up this information.

148. Mr. Gunn expressed concern about several of Complainant's statements at the predisciplinary meeting: Complainant's claim that these incidents are so common with Client 1 as to not warrant an Incident Report; her statement that if she filled out an Incident Report every time she touched a resident, she would be writing Incident Reports all day; and her statement, "If he didn't have rug burns no one would even be talking about it." Mr. Gunn determined that Ms. Beruman did not acknowledge the seriousness of putting hands on a resident and failing to report the occurrence.
149. Citing the QA report's conclusion that Ms. Beruman engaged in physical abuse of Client 1, Mr. Gunn concluded that she had violated the Protection from Harm Procedure, the AMNE Procedure, and the Incident Reporting Procedure.
150. Mr. Gunn also referenced WRRRC's policy of zero tolerance for abuse of residents. The letter indicated that there had never been an instance where abuse leading to bodily injury did not result in separation from employment.

Termination of Ms. Adams

151. Mr. Gunn reviewed Ms. Adams' personnel file and found a January 24, 2008 corrective action in her file. The corrective action was imposed for verbal abuse of a resident, substantiated in a QA investigation, in violation of Procedure III-9-A. The incident involved Ms. Adams raising her voice at a resident and the resident crying. The corrective action letter noted that Ms. Adams had stated she cried and informed the resident she loved him, during the incident. The letter noted that she had been counseled that she "had become too close to this individual and that could set you up for future abuse situations. We also explained how this was not therapeutic for this individual."
152. Ms. Adams did not grieve the January 2008 corrective action.
153. On January 7, 2010, Ms. Gunn issued the termination letter to Ms. Adams. The letter noted that after denying any contact with Client 1 that could have resulted in his injuries, at the predisciplinary meeting Ms. Adams admitted for the first time that Client 1 was on the floor and that she got on the floor to interact with him. The letter found all of Ms. Adams' statements about the interaction with Client 1 to lack credibility, compared to the evidence provided by Clients 1 and 2 and Ms. Beruman.
154. The letter also addressed Ms. Adams' statement that she did not see Ms. Beruman holding Client 1's hands because Ms. Adams was focused on Client 1. "You went on to report that when this resident is having behavioral difficulties you totally focus on him and don't really know what the other staff are doing. This assertion makes no sense in regards to what you reported, as you said the individual was not having a behavioral incident and that you were on the floor with him playing the 'take your ears game'. If [this was the case] then there

would be no reason why you wouldn't have seen you[r] co-worker restrain his hands. If your co-worker restrained the residents (sic) hands and he was not acting out behaviorally then this would be considered abuse and you would be required by law and WRRRC policy and procedure to report this occurrence."

155. Ms. Gunn concluded that the element of Physical Abuse under Procedure III-A-9 had been met because Ms. Beruman's account of the incident indicated that Ms. Adams allowed Client 1 to rub his face into the carpet and become injured.
156. Mr. Gunn concluded that Ms. Adams had probably lied about the incident in order to cover up inappropriately managing the resident's behavior, recklessly causing Client 1 injury.
157. Mr. Gunn noted her prior corrective action for verbal abuse and concluded that she had knowingly and willfully violated that corrective action. He concluded, "This second case of substantiated abuse establishes a pattern of willful misconduct that places residents at risk of abuse. In order to protect the residents and the agency I am compelled to ensure that this pattern cannot be repeated."
158. Ms. Beruman was not credible. Her description of the events on December 6, 2009 has changed significantly at least three times. Her assertion for the first time at hearing that Ms. Stopfer directed her what to write in her December 21 statement underscores the unreliability of her testimony.
159. Ms. Adams was not credible. Her description of the events on December 6, 2009 changed for the first time at the predisciplinary meeting, where she made up the story of playing with Client 1 on the floor when he was not in an emotional state. This story was inconsistent with her own statement at that meeting that she did not see whether Ms. Beruman had contact with Client 1 because Ms. Adams was so focused on Client 1, trying to calm him down. Her description of the events of December 6 is also inconsistent with that of Clients 1 and 2, and Mr. Delahunt, all of whom lacked any motive to lie, and that of Ms. Beruman on December 21, 2009.
160. Complainants timely appealed their termination of employment.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; § 24-50-101, *et seq.*, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801, and generally includes:

- (1) failure to perform competently;
- (2) willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
- (3) false statements of fact during the application process for a state position;
- (4) willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform; and
- (5) final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if the employment is continued.

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. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

A. Complainants committed the acts for which they were disciplined.

Respondent has proven by preponderant evidence that Complainants committed the acts for which they were disciplined. Ms. Beruman's lengthy and detailed admission to Ms. Stopfer on December 21, and her accompanying written report, constitutes the most accurate description of the events of December 6, 2009. On December 21, 2009, Ms. Beruman had no motive to make up this description; at the time, she apparently believed that she had been caught in a previous lie and sought to come clean. In addition, this December 21 description of events is independently corroborated by the accounts provided by both Clients 1 and 2. Although the Clients' statements did not lack credibility on their own, the fact that Ms. Beruman provided corroborating information confirms the accuracy of their reports. Moreover, Ms. Adams told Mr. Delahunt that she and Ms. Beruman had to put Client 1 in a hold.

Complainants argue that Respondent has failed to prove that they physically abused Client 1, or that Client 1 was injured during their shift.

WRRRC Procedure III-A-9 defines "physical abuse" as "the infliction of physical pain, injury, or the imposition of unreasonable confinement or restraint on a person receiving services. This includes, but is not limited to: striking, pushing, pulling, twisting body parts, restricting a person's freedom of movement outside of appropriate, approved CAIT techniques and/or an ISSP, and directing a person to physically abuse another person receiving services."

Ms. Adams used an unauthorized hold and restraint on Client 1 by restricting his freedom of movement on December 6, 2009. She used unreasonable restraint because the physical contact with Client was not necessary, and was in violation of Client 1's

Behavioral Program (or, ISSP). This Program required that after Client 1 threw the telephone, Ms. Adams utilize the list of Interventions. She had a duty to talk to Client 1, encourage him to share his feelings, remind him of his coping strategies, and tell him to stop what he was doing. If these interventions were unsuccessful, then and only then, was she permitted to utilize Safety Control Procedures. The first Safety Control Procedure was to call for assistance. Ms. Adams failed to do this. The second was to block Client 1's blows (of which there were none) and tell him to stop what he was doing. The third was to approach him from behind and place him in a standing PRT. Ms. Adams utilized none of these approved, progressive means of addressing Client 1's aggressive behavior. Instead, she apparently lost control of herself in the situation and engaged with Client 1 physically in a manner that willfully violated Procedure III-A-9.

Once Ms. Adams had Client 1 on the ground, Ms. Beruman also engaged in physical abuse of Client 1. She used unauthorized physical force on Client 1's hands to hold him down, restricting his freedom of movement outside of approved CAIT techniques and the Behavior Program.

The unnecessary restraint and hold imposed by Complainants on Client 1 caused him physical pain and injury. The rug burn abrasions he received during the struggle on the floor were painful and took several days to heal.

Complainants assert that because Ms. Whitmore testified at hearing that the photographs of Client 1's injuries were not identical to the injuries she personally witnessed on December 6, Respondent has failed to prove by preponderant evidence that Client 1 sustained any injuries on December 6, 2009. This argument ignores the eyewitness testimony and documentary evidence of several WRRRC staff who saw the injuries to Client 1 on December 6, 2009. Ms. Whitmore saw Client 1's head injury at 3:30 p.m. on December 6, thirty minutes after Complainants' shift ended, noting that his abrasion was 2 inches long on his left forehead. This account is consistent with the photograph. Mr. Delahunt noticed Client 1's abrasion on his forehead during dinner, at approximately 7:00 p.m., on December 6, 2009. He also informed Ms. Stopfer that he had put Client 1 in holds in the past and that Client 1 rubs his body onto the floor and wriggles fiercely to get out of holds. He reported that although he had seen similar marks on Client 1 after holds before, they did not usually last or scab over like this one did. This evidence demonstrates the seriousness of the injuries sustained by Client 1 on December 6. Ms. Aguilar-Gomez testified that she examined Client 1 in the morning on December 7 and confirmed that he had injuries on his forehead and arm.

Client 1 was injured in three places during the struggle with Ms. Adams and Ms. Beruman on the floor on December 6, 2009. Complainants' willful misconduct caused the injuries to occur.

WRRRC Procedure III-B-6, "Incident Reporting," requires "accurate and timely verbal reporting and written documentation on the agency Incident Report form." Reportable incidents include: injury to a person served (both known or unknown cause); unusual irregularities such as lumps or marking not previously noted; use of emergency

control procedures and/or safety control procedures including physical restraints; allegations of abuse, mistreatment, neglect, or exploitation. Any WRRC staff member who observes or becomes aware of a reportable incident must notify Health Services/Nursing, fill out an Incident Report form and fax it and all attachments to Quality Management by the end of the shift during which the incident occurred.

Both Complainants willfully violated the Incident Reporting Procedure. They were aware of their duty to report any physical restraint of a resident and any injury from a cause known or unknown. They chose instead to hide the incident.

Lastly, both Complainants violated the DHS Code of Conduct by responding to the investigation in a deceitful manner, not being truthful or honest, and failing to accept responsibility for their mistakes.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

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; or 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).

Complainants assert that the investigation into the events of December 6 was arbitrary and capricious because Ms. Stopfer's investigation was flawed. They contend that Ms. Stopfer was motivated by a desire to find Complainants guilty, and that factual discrepancies between Ms. Stopfer's QA report and the police investigator's report render her report untrustworthy.

Ms. Stopfer conducted a professional and thorough investigation into the events of December 6. No evidence was submitted that could demonstrate she was biased against Complainants. Ms. Stopfer followed up on inconsistent information, attempting to resolve potential issues as to motive and credibility. For example, Mr. Delahunt informed her that he had told Ms. Whitmore about Ms. Adams' report of placing Client 1 in a hold. Ms. Stopfer had not received such a report from Ms. Whitmore. Ms. Stopfer followed up on this apparent discrepancy, and determined that Ms. Whitmore had not heard it because she was administering medications at the time.

Ms. Stopfer did not ignore or fail to consider mitigating information provided by Complainants. At the outset of the investigation, the only information provided by

Complainants was a blanket denial of any knowledge as to how Client 1 could have sustained his injuries.

The weight of the evidence considered and discussed in the QA report overwhelmingly supports the conclusions reached and the analysis of the information considered. In addition, the documentary evidence of Client 1's injuries corroborates the other evidence. Any minor discrepancies in witness statements between the QA report, which was a full and complete investigation, and the police report, which was an incomplete investigation of criminal, not administrative, charges, has no bearing on the QA report's reliability.

Complainants also assert that Ms. Gunn did not act as the actual appointing authority in this case; instead, Mr. Kaiser actually assumed that role, in violation of the constitutionally mandated delegation of this authority to Mr. Gunn. The evidence does not support this contention. Mr. Kaiser played a critical and appropriate role in mentoring Mr. Gunn through the entire disciplinary process. Because Mr. Gunn lacked any experience in the disciplinary realm, it would have been arbitrary and capricious for Respondent to fail to provide that guidance.

Complainants also argue that Respondent violated their right to a fair predisciplinary process by failing to provide written notice of the predisciplinary meeting. Respondent points out that Board Rule 6-10, 4 CCR 801, does not require written notice of the predisciplinary meeting. It argues that sending a written notice of the predisciplinary meeting is a best practice that should be followed by state agencies; however, the failure to achieve written notice in this case is not a violation of Complainants' procedural due process rights. And, both Complainants did receive verbal notice of the meeting and were not prejudiced by not receiving written notice.

The minimum procedural due process right in continued employment is a matter of federal constitutional law. *University of Southern Colorado v. State Personnel Board*, 759 P.2d 865, 867 (Colo. App.1998). In *Cleveland Board of Education v. Loudermill, et al.*, 470 U.S. 532, 105 S.Ct. 1487 (1985), the United States Supreme Court provided, "We have described the 'root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* [emphasis in original] he is deprived of any significant property interest.'" *Loudermill*, 470 U.S. 532 at 542. The Court held that pre-termination due process requires that the employee be given notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story, before the termination decision is made. *Id.* at 546; *see also Bourie v. Dept. of Higher Education*, 929 P.2d 18, 22 (Colo. App. 1996). The Court reasoned that "some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision," and that "even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect." *Id.* at 543.

The QA investigation put Complainants on notice of the charges against them; both Complainants stated at the outset of the predisciplinary meetings that they understood the reason for the meeting. Had the investigative process not occurred, a question might have been presented under *Loudermill, supra*. However, under the limited facts of this case, where Complainants were well aware for several weeks of the nature of the charges against them, it is concluded that no procedural due process violation occurred.

Board Rule 6-10 provides,

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 the opportunity to respond. The purpose of the meeting is to exchange information before making a final decision. The appointing authority and employee are each allowed one representative of their choice.

While it is unquestionably a best practice, no current Board rule requires that written notice of the predisciplinary meeting be provided to the employee. The written notice serves a critical role in advising employees of all of their rights under Rule 6-10, particularly the right to a representative, the purpose of the meeting, and the subject to be addressed at the meeting. Mr. Gunn neglected to inform Complainants of their right to a representative in his telephone advisements. Ms. Adams was surprised to learn of this right when the meeting opened. This situation is one of the risks an agency runs when it fails to provide written notice of the predisciplinary meeting.

Without advance notice of the right to a representative, it is impractical for an employee to take advantage of this right. The right becomes a less meaningful and enforceable one. Respondent arguably cured this error by reading Rule 6-10 at the beginning of each predisciplinary meeting with Complainants. And, once advised of the right, neither Complainant requested to postpone the meeting in order to have a representative present. Therefore, they consented to proceed without representation.

In summary, although Respondent did not violate Board Rule 6-10, the situation that occurred in this case should be avoided in order to meaningfully implement the right to a representative.

C. The Appointing Authority's action was within the range of reasonable alternatives available.

The credible evidence demonstrates that the appointing authority pursued his decision thoughtfully and with due regard for the circumstances of the situation as well as Complainants' individual circumstances. Board Rule 6-9, 4 CCR 801.

Complainants held positions of trust at WRRRC. The vulnerable residents depend upon such staff to comply with all applicable policies and procedures, including their Behavior Programs. Complainants violated that trust in a residential home where their performance could not be constantly monitored. They engaged in patient abuse and did not follow proper procedures that would have maximized Client 1's safety. They then failed to report the incident as required and willfully lied about it. As such, their conduct in this matter demonstrated that they cannot be trusted to serve at WRRRC again. Therefore, termination was within the range of reasonable alternatives available to Respondent.

D. Complainants are not entitled to an award of attorney fees and costs.

Complainants request an award of attorney fees and costs. Because Complainants' termination of employment is being upheld, there is no basis for such an award.

CONCLUSIONS OF LAW

1. Complainants committed the acts for which they were disciplined.
2. Respondent's decisions were not arbitrary, capricious, or contrary to rule or law.
3. The disciplinary actions imposed were within the range of reasonable alternatives; and
4. Complainants are not entitled to an award of attorney fees and costs.

ORDER

Respondents' actions are affirmed. Complainants' appeals are dismissed with prejudice.

Dated this 23rd day of September, 2010


Mary S. McClatchey
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. 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. 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

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An appellant may file a reply brief within five days. Board Rule 8-72, 4 CCR 801. An original and 9 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Board Rule 8-73, 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.

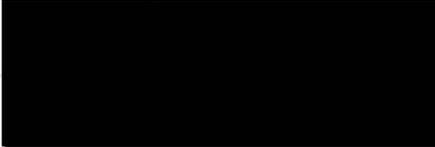
PETITION FOR RECONSIDERATION

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.

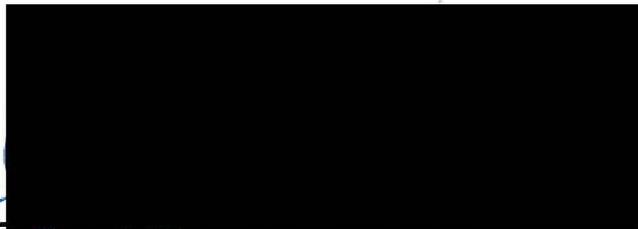
CERTIFICATE OF MAILING

This is to certify that on the 23rd day of Sept. 2010, I electronically served copies of the foregoing **INITIAL DECISION** and **NOTICE OF APPEAL RIGHTS** as follows:

Mark Schwane



Eric Freund



 Andrea C. Woods