

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2015B089

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CAROL CORDOVA,
Complainant,

v.

DEPARTMENT OF HUMAN SERVICES, OFFICE OF COMMUNITY ACCESS & INDEPENDENCE, WHEAT RIDGE REGIONAL CENTER,
Respondent.

Administrative Law Judge (ALJ) Keith A. Shandalow held the evidentiary hearing in this matter on January 25, 26 and 27, 2016, at the State Personnel Board, 1525 Sherman Street, Courtroom 6, Denver, Colorado. The record was closed on January 29, 2016. Davin Dahl and Jack Patten, III, Assistant Attorneys General, represented Respondent, the Colorado Department of Human Services. Respondent's advisory witness, and Complainant's appointing authority, was Holly Duke, Qualified Intellectual Disabilities Professional (QIDP). Complainant was represented by Jennifer Robinson, Esq.

MATTERS APPEALED

Complainant, who was employed by Respondent as a Licensed Psychiatric Technician (LPT), and was a certified state employee, appeals the April 10, 2015 termination of her employment. Complainant argues that she did not commit the acts for which she was disciplined; that Respondent's decision to terminate her employment was arbitrary, capricious and contrary to rule or law; and that the discipline imposed was not within the range of reasonable alternatives. Complainant requests reinstatement, back pay and benefits, and attorney fees and costs.

Respondent, Department of Human Services, argues that Complainant did commit the acts and omissions for which she was disciplined; that the disciplinary action was not arbitrary or capricious or contrary to rule or law; that the discipline imposed was within the range of reasonable alternatives; that the decision to terminate Complainant's employment should be upheld; and that Complainant is not entitled to any of the requested relief.

For the reasons presented below, the undersigned ALJ finds that Respondent's disciplinary action is **affirmed**.

ISSUES¹

1. Whether Complainant committed the acts for which she was disciplined;

¹ In her appeal form initiating this matter, Complainant also alleged discrimination on the basis of age and disability. At the start of the evidentiary hearing, Complainant stated that she was pursuing those claims in a different venue and not with the State Personnel Board.

2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the range of reasonable alternatives; and,
4. Whether Complainant is entitled to attorney fees and costs.

FINDINGS OF FACT

General Background:

1. Complainant began her employment with Respondent in 1989.
2. At all times relevant to this matter, Complainant was a Licensed Psychiatric Technician (LPT) and a certified state employee.
3. Wheat Ridge Regional Center (WRRRC) is one of three state facilities responsible for the care of disabled citizens. WRRRC's residents live in 19 separate houses.
4. The primary duties of an LPT include the following: dispensing medications, attending to the needs of the residents, cooking, cleaning, and reporting about each of the residents to the supervisor (also referred to as the "line charge") of the next shift.
5. All employees of the Department of Human Services are required to adhere to the departmental Code of Conduct, which provides as follows (emphasis in original):
 - Treat all customers fairly.
 - Be truthful, honest, and courteous to co-workers and to customers at all times.
 - Listen actively and share information in open, honest, and appropriate ways.
 - Demonstrate respect for all people and their ideas, and commit to resolve conflicts.
 - Be considerate of fellow workers when performing job tasks.
 - Accept responsibility for own mistakes; ask for clarification and guidance when unsure about job duties.
 - Communicate your needs clearly to people in our organization.
 - Show support of departmental decisions through your actions.
 - Assist customers and co-workers in a positive manner and follow through on commitments to them.
 - Do your job proactively, don't wait to be told; see the problem, ask for guidance if needed, solve the problem and inform others what was done.
 - Propose solutions to problems.
 - Complete tasks, meet deadlines, and communicate any reason for delay.
 - Stay current with technical knowledge available for their skill field.
 - Adapt and be flexible when change happens.
 - Take the initiative about seeking communication; don't always wait for it to come to you.
 - Be committed to your job and present yourself as a good role model.
 - Treat others as they wish to be treated.
 - Have a CARE attitude (Caring Attitude Reaps Excellence)

Definition of Respect = Recognizing another's viewpoint without sacrificing your own so that both parties feel their opinions are valid.

6. Prior to her termination on April 10, 2015, Complainant received 4 disciplinary actions and 18 corrective actions, for such performance issues as violations of the Code of Conduct, being rude, disrespectful and argumentative with co-workers, attendance and tardiness issues, driving a state vehicle with a suspended license, and other performance issues.

Complainant's Performance History

7. Department of Human Services' employees are evaluated by supervisors on a regular basis via a Performance Management and Pay (PMAP) form. For an LPT like Complainant, the PMAP provides a supervisor the opportunity to rate an employee on five core competency areas – Communication, Interpersonal Skills, Customer Service, Accountability, and Job Knowledge. For each core competency areas, and as an overall performance evaluation, a supervisor rates the employee's performance as either a Level 1, indicating that employee's performance does not meet expectations and needs improvement, a Level 2, indicating that the employee is proficient and successful and occasionally exceeds expectations, or a Level 3, which indicates that the employee's performance is outstanding, exceptional and consistently exceeds expectations.

8. On Complainant's 2008-2009 PMAP, she received a Level 1 rating in Communication and a Level 1 rating in Interpersonal Skills. Among the comments noted in the document are the following:

- 4/5/08: Refused to work with coworker/numerous disagreements.
- On 4/10/08, supervisor states that a resolution mtg took place, at which she agreed to abide by Employee Code of Conduct and communicate differences.
- 7/9/08: Mediation mtg with RD, RC, Carrie² and [other employee name].
- 10/10/08: Pool staff reported 3 times working with Carrie was rude and ordered staff around, never happy with their performance.
- 1/23/09: Memo from OT stating argumentative/not following guidelines.
- 1/18/09: Coworkers report rude treatment while working with Carrie
- 1 /23/09: Very argumentative with RC
- 2/18/09: Corrective action for interpersonal skills
- 3/19/09: Memo from staff stating rude treatment

9. On Complainant's 2009-2010 PMAP, she received a Level 1 rating in Communication and a Level 1 rating in Interpersonal Skills. Among the comments noted in the document are the following:

- 7/29/09: Memo from peer stating lack of communication and demeaning vs positive approach; very argumentative. Did not comply with QMRP's request to document and communicate to Dave Johnson.
- 7/9/09: Poor interpersonal skills continue to be an issue.
- 1/10/10: Numerous conflicts with coworkers - statements on file.

10. On Complainant's 2010-2011 PMAP, she received the lowest possible Level 2 rating in Communication and a Level 1 rating in Interpersonal Skills. Among the comments noted in the document are the following:

² Complainant is often referred to as "Carrie" in internal documents.

- Carrie has had some issues w/ appropriate interactions with coworkers. A performance memo was given.
- Documented issues: communication w/ coworkers and creating negative work relationship with others.

11. On Complainant's November 16, 2011 PMAP, given to Complainant at mid-year due to a supervisor change, Complainant received a low Level 2 rating in Communication, and a Level 1 rating in Interpersonal Skills. Comments on this PMAP included the following:

- Carrie exhibits some challenges in regards to communication w/ her coworkers at times. Has had some complaints about her in regards to being rude.
- Carrie has had some issues at times w/ pool staff and new staff when she requests things she had complaints of appearing to be rude and curt w/ others.
- Has trouble interacting with others at times, can appear rude and curt. Sometimes has issues adhering to the Code of Conduct.

12. On Complainant's October 11, 2012 PMAP, given at mid-year due to a supervisor change, Complainant received a Level I in Interpersonal Skills with the following comments:

- Would not follow charge staff directions.

13. On Complainant's 2012-2013 PMAP, she received a Level 1 rating in Communication and a Level 1 rating in Interpersonal Skills. Among the comments noted in the document are the following:

- Need to improve communication with staff working with during shift.
- Need to listen to requests by supervisor.
- Be sure to read daily log.
- Peers are consistently upset with the way the guidance given during 3rd shift. Being a charge person on 3rd, need to develop rapport with coworkers.
- Needs to communicate more about work and less about personal matters on the job.

14. On Complainant's 10/9/2013 PMAP, given at mid-year due to a supervisor change, Complainant received a Level 1 rating in Interpersonal Skills. Among the comments noted in the document are the following:

- Carrie shows little effort to attempt to get along with her peers.
- There have been numerous reports of harassment of staff or not communicating at all.

15. On November 8, 2013, Complainant was given a corrective action that addressed Complainant's need to improve her interpersonal skills. Complainant's appointing authority noted that:

A recent QA investigation revealed that there have been multiple accounts of unprofessional, argumentative behavior toward co-workers while working 3rd shift at 87th house. This has resulted in a non-therapeutic environment for the residents and an unpleasant working environment for fellow employees. A review of your employee file shows that interpersonal skills and communication have been areas that need improvement for the past 4 years. You have previously received in-

service memos, performance memos, and a corrective action to improve this area of competency.

Complainant was required to take the following corrective actions: (1) interact professionally with co-workers; (2) adhere to the Colorado Code of Conduct; (3) notify her supervisor of any conflicts that arise that could lead to unprofessional behavior; and (4) achieve a Level 2 PMAP rating in the interpersonal skills competency and Communication competency for the 2013-2014 PMAP cycle, and maintain a Level 2 performance rating in these areas for the remainder of her employment at WRRC.

16. In her final PMAP for 2013-2014, Complainant was rated a Level 1 in both Communication and Interpersonal Skills, with these comments:

- Carrie has had a few issues this past year with Code of Conduct, communication with coworkers and yelling at coworkers in front of residents. Carrie needs improvement in this area.
- Carrie has had Code of Conduct issues, yelling and arguing with coworkers in front of individuals we serve.
- She needs improvement in interpersonal skills.

17. On April 24, 2014, Complainant was given a corrective action for attendance issues.

18. On June 6, 2014, a Rule 6-10 meeting was held to discuss job performance issues regarding violation of Complainant's November 8, 2013 Corrective Action/Improvement Plan dated November 8, 2013.

19. On July 8, 2014, Complainant's appointing authority at the time, Kevin Kemper, imposed a disciplinary reduction of pay of 5% for six months from August 2014 through January 2015. "The reason for the disciplinary action is violation of the Colorado Department of Human Services (CDHS) Code of Conduct and failure to achieve a Level 2 Performance Management and Pay (PMAP) performance rating in the interpersonal skills competency and communication competency for 2013-2014 PMAP cycle." Mr. Kemper wrote that, at the Rule 6-10 meeting, "[w]e discussed the Corrective Action that you received 11/8/2013- you remembered receiving it. You were not in agreement with the Corrective Action stating that your co-worker was always trying to sleep and when you encouraged them to get busy they turned you in for harassment. The Grievance Rights are indicated on the Corrective Action; however, you did not grieve the Corrective Action. A Quality Assurance Investigation revealed that there were multiple accounts of unprofessional, argumentative behavior toward co-workers. This has resulted in a non-therapeutic environment for the residents and an unpleasant working environment for fellow employees."

Mr. Kemper elaborated on the foundation for the disciplinary action:

Multiple staff on multiple homes saying that you are disrespectful, you don't take any direction or guidance, your response to staff is how long you've worked here, or you will report them to QA, or you tell them to shut up. Staff are reporting the same thing. You stated you don't tell people to shut up. You reported that staff are trying to get you off the house...telling lies. You were asked why do people want you off the home; you were asked why do people think this- you have homes and co-workers that you are not able to work with. In review of your file and with most current events, where ever

you are assigned there is turmoil in the home. You stated that you apply for other positions at homes but don't get calls back. During our meeting on June 6, 2014, I did not hear that you have any self-reflection on how you could improve...you are the victim, every time. You stated that you are not perfect but there is no reflection on how you can improve in the areas of communication or interpersonal relations. Nurses, professional support staff, and co-workers etc., all report consistent unsatisfactory performance in communication and interpersonal skills. Your unsatisfactory performance in these areas is affecting your ability to complete your job duties, is affecting co-workers, and is affecting the residents.

20. Complainant did not appeal this disciplinary action.

21. On July 23, 2014, Complainant was placed on a Performance Improvement Plan ("PIP") after receiving an overall Level 1 rating on her final PMAP for the 2013/2014 year, indicating a "needs improvement" rating. The PIP provided that "[i]n order to meet department and agency expectations, you must have an overall rating of at least Level 2 on your PMAP." As background, the PIP noted that:³

A 6-10 Meeting was held on June 6, 2014 regarding unsatisfactory communication and interpersonal skills and violation of the Colorado Department of Human Services Code of Conduct. It was reported that you have responded to co-workers with what does 1st shift do if I do all the meds and that you have a pattern of challenging people; making threats, being disrespectful. Staff are not comfortable working with you. You came into relieve staff and called staff a skank. You had a situation on 2nd shift where staff were mad that you were late- they told me to shut my trap it was reported that you came in and said that at least the kitchen is clean. You stated that you get out of there as fast as you can- thats all I can do- when asked if you think this follows satisfactory communication or interpersonal skills you said, "every day I try." when asked to sweep and mop the day room and kitchen floors you insist on using laundry soap instead of floor cleaner- your exact words according to your co-worker was "this is the way I was trained, to use detergent." After explaining that we've had issues in the past with that soap you went ahead and mopped with laundry soap. LPT had to remind you to change your gloves before going to another resident. LPT had to ask you to change feeding bags since all the responsibilities come back to the LPT. Reported that you do not listen to other's advice-is disrespectful-tells staff to shut up. Does not share important information such as seizures/BMs. The day room is supposed to get deep cleaned on Wednesdays and you only sweep it down and respond with, "I know, I've worked her for over 20 years." It was reported that you have a bad attitude, come off disrespectful; when in a potential escalating scenario you will respond with "shut your mouth or I will report you to QA." Staff ask you would you please change your gloves and you stated, "I barely touched her." Staff explained why we change our gloves (to prevent transmission, you stated, "I guess your right" and changed gloves, then on another situation when a co-worker was doing rounds you stated that they did not need to check on her job, don't need to check on what's going on, or how she does it- staff believe you're making it a hostile work environment raising your voice, cursing, and being- saying smart comments, staff saying they can't work with you multiple staff on multiple homes saying that you are disrespectful, you don't take any direction or

³ Original documents are quoted from verbatim, including misspellings and grammatical errors.

guidance, your response to staff is how long you've worked here, or you will report them to QA, or you tell them to shut up. Staff are reporting the same thing.

22. The PIP enumerates expectations for Complainant in the different core competency areas. In the area of Communication, Complainant was expected to do the following:

- You must maintain at least a proficient Level (2) In the following:
- Listens effectively to others' ideas, problems, and suggestions.
- Works to an open manner, shares Information with others to get the job done.
- Adapts communication methods to respond to different audiences. Communication, written and oral, is effective, well organized, accurate, complete, clear, and understandable.
- Responds in a prompt and friendly manner to requests and Inquires. Accessible to others and responsive to their questions, needs, concerns.
- Communicates to provide or exchange information while keeping others informed. Communicates pertinent information to members of the team including the guardian. Keeps supervisor warned. Communicates pertinent Information to member of the team including the guardian. All communications are presented in a tactful and professional manner being both effective and well organized.
- Prepares written documents, as necessary, which are complete, well organized, clear and understandable. Written correspondence is legible, understandable and Informative. Meets deadlines.
- Appropriate In all communications regardless of race, age, gender, culture, ability, religion, or sexual orientation.
- Provides a positive role model for others in communications, use of language, dress, behavior for the environments and other actions. Acts as a role model by positive communication, professional dress and demeanor. Attends meetings as needed.

23. In the area of Interpersonal Skills, the PIP required Complainant to do the following:

- You must maintain at least a proficient Level (2) in the following:
- Well regarded by colleagues, can interact easily with a diverse workforce.
- Approach to conflict resolution is cooperative, creating enhanced teamwork, without hard feelings.
- Accepts criticism, is open to new ideas.
- Addressing concerns directly with the individuals involved. Gets along with others, maintains sensitivity to others by acting positively and keeps supervisor informed. Demonstrates the values in the CDHS Employee Code of Conduct.
- Makes a special effort to boost employee morale and create a positive work environment.
- Solves Issues and concerns by presenting options.
- Creates and maintains an environment that encourages open communication, mutual trust, Inclusion, and one in which employees are listened to regardless of their position In the organization.
- Displays positive attitude related to development or changes. Treats others with respect.

24. The PIP also provided that Complainant's supervisor, Brooke Renker, would provide mentoring, monitor and observe her work performance and interpersonal interactions, gather input and provide feedback, send evaluation forms to co-workers and residents to get their feedback about Complainant's interactions with them to obtain an objective view of Complainant's work performance. Ms. Renker also indicated that she would meet weekly with Complainant to review Complainant's progress. The PIP was to last 90 days.

25. Ms. Renker did not fulfill all her obligations under the PIP, but did talk with Complainant regularly.

Complainant's Transfer to Nelson House and Co-Worker Complaints

26. In September 2014, Complainant was moved to the third shift at Nelson House.

27. Nelson House houses 6-8 nonambulatory residents of both sexes who need assistance in all their daily needs.

28. The third shift works from 10:30 p.m. to 6:30 a.m.

29. At Nelson House, besides being generally responsible for passing out medications to the residents, Complainant was responsible for preparing meals for the residents for the next day, as well as assisting with the care of the residents. She would also be responsible for providing a shift report to the first shift's line charge, Patti Sexton, when the first shift relieved the third shift at approximately 6:30 a.m. The shift report included information about any unusual situations, what occurred during the third shift, a report on each of the residents, and a walk-through.

30. The third shift typically had two employees working each night. Only three employees worked the third shift, including Complainant. At all relevant times, the other two employees were Wendy Nabb, another LPT, and Patience Akhiero, a client care aide. Whenever Complainant worked the shift, she would work with either Ms. Nabb or Ms. Akhiero.

31. On October 28, 2014, Ms. Renker received a verbal complaint about Complainant regarding furniture in a resident's room. It was reported that Complainant was rude and told her co-worker that she knew best how the resident's room should be arranged.

32. On December 9, 2014, Complainant sent a written complaint to Ms. Renker about another co-worker. Complainant's concerns were raised by other employees as well and Complainant's complaint was substantiated.

33. On February 12, 2015, Complainant wrote Ms. Renker a note complaining about Ms. Akhiero, alleging that Ms. Akhiero did not do her job and was antagonistic when confronted by Complainant. The note also asserted that Ms. Akhiero told Complainant to shut up and that "nobody wants to work with you."

34. On February 13, 2015, Wendy Nabb sent a note to Ms. Renker, and stated that Complainant "complains about everything. She has been fighting with Patience. Now she's trying to get me to side with her."

35. On February 18, 2015, Ms. Sexton, the first shift line charge, sent an email to Ms. Renker, complaining about Complainant's texturizing the food for the residents and the spices that Complainant used that were not tolerated by the residents. Ms. Sexton also complained that Complainant did not dispense medications before she left work every day, only on certain days, and said that the first shift LPT needed to do some work. Ms. Sexton indicated that Complainant was snide about it. Ms. Sexton also complained that Complainant ordered food that was not used and went bad. Finally, Ms. Sexton stated that Complainant was not communicating well with respect to the shift report, was dismissive and short, would not clarify, and acted like she was in too big a hurry to provide the necessary information about the residents.

36. On February 18, 2015, Complainant's co-worker, Patience Akhihiero, submitted a complaint about Complainant, in which she reported that Complainant "has been very difficult to work with...." She added that Complainant "also talked about how she's taking everybody down with her regards of what they did to her." Ms. Akhihiero noted that, "I tried team work with her, after helping her with the cooking, I end up doing all the residents changing and repositioning all by myself, except [client name]." Other comments included the following:

"I don't like to complain about coworkers but it has gotten to the stage that I tend to call-in the days I work with her. The work environment is now very hostile ...It's just been hell."

"She throws a tantrum each night, throwing pots and dishes all over."

37. As a result of the complaints received about Complainant in February 2015, Complainant was sent for a training entitled Communicating Non-Defensively. Complainant participated in that training on March 4, 2015.

38. On March 16, 2015, Complainant sent a note to Ms. Renker complaining about Ms. Akhihiero. Complainant alleged that Ms. Akhihiero refused to help her, was mean to her and Complainant was trying to keep a positive attitude but she was too busy and was not being helped. Complainant concluded by writing, "[p]lease help me with this situation. You can call me anytime." No evidence was presented that Ms. Renker took any action at that time to specifically address this situation.

39. Ms. Nabb sent a note to Holly Duke, Complainant's appointing authority, on March 18, 2015, stating that "[a]s of last week, Carrie was here on Friday. She came in and complained about the other staff Patience, she said nobody here does their job~ she has to come in and straighten the cupboard and clean before she can start her shift. She said she will take everyone down! Meaning if she gets in trouble, everyone will be in trouble."

40. On March 18, 2015, Sisay Alemu, who works the second shift at Nelson House, submitted a note indicating that on March 16, 2016, Patience told him she and Complainant were fighting the previous night and that Patience almost killed Complainant. Mr. Alemu wrote that he was "really concerned about the situation between Carrie and Patience and before it gets worse I wanted to report it to ... Brook."

41. On or about March 17, 2015, Ms. Duke became more directly involved in the situation and the conflict between Complainant and her co-workers. She considered moving Complainant to another house, but learned upon inquiry that the house she was considering did not need an LPT on the third shift. Complainant could only work the third shift because she had a suspended license and could not drive a state vehicle, which would have been a requirement had she worked either of the other two shifts.

42. On or about March 17 or March 18, 2015, Ms. Duke made a preliminary determination that Complainant had violated the Code of Conduct in her interactions with Ms. Akhihiero and put Complainant on administrative leave with pay, pending further investigation.

43. On or about March 18, 2015, Ms Duke decided to set up a Rule 6-10 meeting with Complainant.

44. Prior to the Rule 6-10 meeting, Ms. Duke reviewed Complainant's personnel file kept at WRRC and noted the many corrective and disciplinary actions imposed on Complainant over the years

addressing Complainant's issues with communication and interpersonal skills, as well as other job performance deficiencies.

45. On March 23, 2015, Complainant sent a note to Respondent's HR department, complaining about the work environment, her treatment, and that nothing had been done to alleviate the situation. No evidence was presented that anyone responded to Complainant about this note.

46. Ms. Duke did not see this note until after Complainant was terminated. She would have considered it prior to her decision had she seen it. No evidence was presented to indicate that it would have changed her decision or modified it in any way.

March 31, 2015 Rule 6-10 Meeting and Its Aftermath

47. At the March 31, 2015 Rule 6-10 meeting, Complainant was accompanied by a representative. Pam Kraus. Ms. Duke's representative was Robin Brown of Respondent's HR department. Ms. Duke presented the information about the reason for potential discipline, and gave Complainant the opportunity to respond. Ms. Duke reviewed Complainant's more recent history of disciplinary and corrective actions concerning communication and interpersonal skills, as well as the complaints lodged by her co-workers after Complainant's transfer to Nelson House. Although Ms. Duke did not identify by name the authors of the complaints against Complainant, the nature of the complaints made it obvious to Complainant who it was who made the complaint. Complainant generally defended her actions and accused her co-workers of harassment. Complainant also complained that her complaints had not been followed up on.

48. On April 1, 2015, Complainant sent Ms. Duke a letter adding some things that she had failed to mention at the Rule 6-10 meeting. Complainant rehearsed many of the incidents going back several years in which she felt she had been treated badly. She complained that she had sent Ms. Renker several notes concerning the atmosphere at Nelson House with Ms. Akhihero but nothing was done about it. Generally, the letter indicates that Complainant felt that she had been treated badly by supervisors and co-workers and that she wanted to retire with 30 years' credit, which was another four years.

49. Prior to making her decision to terminate Complainant's employment, Ms. Duke reviewed Complainant's personnel file, including but not limited to the many corrective actions, disciplinary actions, performance memoranda, customer satisfaction surveys and PMAPs that documented Complainant's performance deficiencies over an extended period of time with respect to the core competencies of Communication and Interpersonal Skills. Ms. Duke also spoke with Complainant's supervisor, Ms. Renker, and her co-workers. She also reviewed and considered Complainant's comments at the Rule 6-10 meeting and in her April 1, 2015 email.

April 10, 2015 Notice of Disciplinary Action

50. On April 10, 2015, Complainant was handed a letter, constituting a notice of disciplinary action, signed by her appointing authority, Holly Duke, informing her of the decision to terminate her employment with Respondent. The notice reviewed the matters discussed at the Rule 6-10 meeting held on March 31, 2015, and addressed the issues raised by Complainant in her April 1, 2015 email to Ms. Duke. Ms. Duke pointed out that Complainant had continued to fail to meet expectations delineated in previous PMAPs, corrective and disciplinary actions concerning violations of the Code of Conduct, and failure to maintain a Level 2 rating in the core competency areas of Communication and Interpersonal Skills.

51. In the disciplinary letter, Ms. Duke noted that at the Rule 6-10 meeting, Complainant's representative suggested that Complainant might not have been given the tools to succeed in communication and interpersonal skills. Ms. Duke reminded Complainant that in her June 6, 2014 Rule 6-10 meeting, Complainant was able to define satisfactory communication and interpersonal skills without difficulty, indicating that Complainant understood what was expected of her.

52. Ms. Duke concluded her letter as follows:

In closing, having considered all the information provided, it is clear you have not been able to meet expectations regarding interpersonal relations and communication, or able to promote an environment of trust and respect for staff and especially for the people we serve. Additionally, you stated in your R-6-10 meeting and your 4/1/15 letter that you do not want to return to work at the Wheat Ridge Regional Center.

Therefore, I have decided, after careful deliberation and consideration of all information gathered, in accordance with Board Rule 6-9, to separate you from state service effective April 10, 2015 due to repeated violation of CDHS Employee Code of Conduct and failure to meet expectations as stated in the Corrective Action from 11/8/13, 6-10 disciplinary action letter from 6/6/14, and the Performance Improvement Plan from 7/23/14.

53. The disciplinary letter also included appropriate notice of Complainant's appeal rights.

54. Complainant timely appealed her termination to the Board.

DISCUSSION

I. GENERAL

A. Burden of Proof

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; § 24-50-101, C.R.S. *et seq.*; *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 the preponderance of the evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at 704.

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

II. HEARING ISSUES

A. Complainant committed the acts for which she was disciplined.

One of the essential functions of a *de novo* hearing process is to permit the Board's administrative law judge to evaluate the credibility of witnesses. See *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987) ("An administrative hearing officer functions as the trier of fact, makes determinations of witness' credibility, and weighs the evidence presented at the hearing"); *Colorado Ethics Watch v. City and County of Broomfield*, 203 P.3d 623, 626 (Colo. App. 2009) (holding that "[w]here conflicting testimony is presented in an administrative hearing, the credibility of the witnesses and the weight to be given their testimony are decisions within the province of the presiding officer"). The testimony of Respondent's witnesses – Brooke Renker, Wendy Nabb, Patti Sexton, Patience Akhiero, and Holly Duke – was credible.

Respondent has successfully demonstrated by a preponderance of the evidence that Complainant continued to struggle in the core competency areas of Communications and Interpersonal Skills after the corrective and disciplinary actions imposed on her in 2014, after the PIP created for her in 2014 and after her transfer to Nelson House. Respondent established by a preponderance of the evidence that Complainant was significantly deficient in the areas of Communication and Interpersonal Skills over a very long period of time, and despite numerous prior disciplinary and corrective actions, performance memoranda and customer performance surveys critical of Complainant's performance in these areas, there was no sign of improvement. Again and again, Complainant demonstrated a tendency to argue with her co-workers, to be rude and dismissive towards them, to fail to work as a team member and assist others when asked, to fail to communicate her shift reports clearly, thoroughly and respectfully, and to generate the kinds of cooperative and collegial relationships with co-workers essential for an employee in her position at a facility like WRRRC. It may be that some of her co-workers could be faulted for their part in these dysfunctional interpersonal relationships. It is also true that Ms. Renker and Ms. Duke could have done more to address the work environment at Nelson House after Complainant was transferred there. However, the near-universal opinion of her co-workers that Complainant was very difficult to work with and was at fault for such dysfunction, and the fact that the conflict that finally led to the March 2015 Rule 6-10 meeting was with a person who had no conflict with the other LPT with whom she worked, establish that Complainant has been unable to overcome her performance issues in these core competency areas and continued to fail to meet performance expectations. There is no evidence that earlier and more forceful intervention by Ms. Renker or Ms. Duke would have led Complainant to finally overcome her communication and interpersonal skills deficiencies.

Accordingly, Respondent has proven by a preponderance of the evidence that Complainant committed the acts for which she was terminated.

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

(1) Respondent's decision to impose discipline was neither arbitrary nor capricious:

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).

Respondent's decision to terminate Complainant's employment was neither arbitrary nor capricious. Ms. Duke reviewed all the evidence available to her that addressed Complainant's performance deficiencies in the areas of communication and interpersonal skills and solicited Complainant's input and feedback.

At the hearing, Complainant argued that Ms. Duke's failure to determine who was at fault in Complainant's conflict with Ms. Akhihero, her decision to put Complainant on administrative leave but not Ms. Akhihero, and her termination of Complainant's employment, constituted arbitrary and capricious actions. Ms. Duke, however, was not in any position to determine what specifically occurred on the last night that Complainant and Ms. Akhihero fought, or who was at fault on that occasion. Ms. Duke was in possession, though, of all the reports of Complainant's issues going back many years, and all the reports from co-workers and supervisors detailing these deficiencies. She was also aware of the other complaints about Complainant from co-workers after Complainant was transferred to Nelson House. In short, she gathered sufficient evidence to determine that Complainant's ongoing issues were not improving and that there was little reason to believe that Complainant was capable of correcting her performance deficiencies in these areas.

At the hearing, Complainant also argued that Ms. Renker's failure to fulfill her obligations under the 2014 PIP was arbitrary and capricious, and she implied that had Ms. Renker mentored and monitored her more consistently, and obtained an objective view of Complainant's co-worker's opinions of Complainant, Respondent would not have a legitimate reason to terminate Complainant's employment. If Complainant's performance history had not included so many performance reviews, corrective actions, disciplinary actions, performance memoranda, and customer satisfaction surveys all complaining that Complainant had significant issues with her communication and her interpersonal skills, Complainant's position may have been well taken. But given all the previous notice and focus on these areas, there is no reason to believe that Ms. Renker's additional mentoring or further comments from co-workers would have resulted in Complainant's reformation and a different, more complimentary, view of Complainant's performance in these areas.

Respondent also established by a preponderance of the evidence that Ms. Duke gave candid and honest consideration of the evidence before her, considering alternatives to termination before finally deciding that it was highly unlikely that a transfer would solve

Complainant's performance deficiencies. Finally, Ms. Duke's conclusions after she reviewed the information she gathered are fully justified by the evidence she considered.

(2) Respondent's action was not contrary to rule or law:

A. Board Rule 6-9:

Respondent's determination in taking disciplinary action comports with Board Rule 6-9, 4 CCR 801, which requires that a decision to take disciplinary action "shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered."

The evidence at hearing demonstrated that Respondent evaluated the evidence supporting the allegations of Complainant's continued inability to meet reasonable expectations in the core competency areas of communication and interpersonal skills. These competencies are essential given the nature of the residents at WRRC and especially Nelson House, who are nonambulatory and depend on the staff to care for all their needs. The failure to communicate effectively and respectfully, and the failure to peacefully and effectively work with co-workers presented a significant risk to the health and safety of the residents of Nelson House, and created a very unpleasant work environment for Complainant's co-workers. Given the seriousness of Complainant's deficiencies in these areas, the effect that these deficiencies had on the residents and Complainant's co-workers, Complainant's previous corrective and disciplinary actions, and her performance evaluations, the decision to terminate was justified.

The evidence established that there was no violation of Board Rule 6-9 in Respondent's decision as the nature, extent, and seriousness of the violations in the case required the imposition of the discipline that was imposed.

B. Board Rule 6-10:

Board Rule 6-10, 4 CCR 801, provides, in relevant part: "When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision."

Complainant did not dispute Respondent's compliance with Board Rule 6-10. Respondent met with Complainant prior to the issuance of any discipline and gave her the opportunity to present any information regarding the allegations against her. Ms. Duke reviewed and considered Complainant's comments at the Rule 6-10 meeting and her letter sent the next day. Although Ms. Duke should have identified the authors of the complaints against Complainant by name, the context clearly indicates who those authors were, and Complainant knew who they were. Accordingly, there was no violation of Board Rule 6-10 in this matter.

C. The discipline imposed was within the range of reasonable alternatives.

The final issue is whether the discipline imposed was within the range of reasonable alternatives available to Respondent.

Complainant had been the subject of multiple attempts to allow her to correct her deficient job performance in the area of communication and interpersonal skills. Prior corrective actions and disciplinary actions had put Complainant on notice of the need to improve these areas, and warned her that failure to do so would lead to more severe consequences. Complainant failed to improve in those areas. Furthermore, these two areas were among the five core competencies required of LPTs. These were core competencies because, given the nature of the population served, failure to effectively and respectfully and thoroughly communicate, and failure to work smoothly and conflict-free with co-workers would very likely distract the staff from attending to the significant needs of the residents of Nelson House. Such distractions could have significant deleterious effects on the medical and health needs of the residents.

Ms. Duke's assessment that Complainant failed to take responsibility for the conflicts she had with numerous co-workers, and the fact that so many complaints were voiced within the first few months of Complainant's transfer to Nelson House, reasonably led Ms. Duke to conclude that it was unlikely that Complainant would be able to improve her performance in the area of communication and interpersonal skills. The termination of Complainant's employment was within the range of reasonable alternative under such circumstances.

D. Complainant did not establish a basis for entitlement to attorney fees and costs.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. 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 R-8-38(B), 4 CCR 801.

In this matter, Respondent's actions have been upheld, grounded as they were in fact and in law. Complainant has not demonstrated that Respondent's decision to terminate her employment was frivolous, done in bad faith, done maliciously or as a means of harassment, or was groundless. Therefore, attorney fees and costs is not warranted.


CONCLUSIONS OF LAW

1. Complainant committed the acts for which she was disciplined.
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was within the range of reasonable alternatives.
4. Complainant's request for attorney fees and costs is denied.

ORDER

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

Dated this 14th day
of March, 2016 at
Denver, Colorado.



Keith A. Shandalow
Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

This is to certify that on the 14th day of March, 2016, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Jennifer Robinson, Esq.
Robinson & Associates Law Office, LLC
3300 S. Parker Road, Suite 330
Aurora, CO 80014
jrobinson@raemployment.com

Davin Dahl
Jack D. Patten, III
Employment/Personnel & Civil Rights Unit
Civil Litigation & Employment Law Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, CO 80203
Davin.Dahl@coag.gov
Jack.Patten@coag.gov



Dana Shea-Reid

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 8-62, 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 8-65, 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 Rules 8-62 and 8-63, 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 electronic record on appeal in this case is \$5.00. 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 8-64, 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 8-66, 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 8-70, 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 8-60, 4 CCR 801.

