

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MELISSA LORENZO,
Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, OFFICE OF COMMUNITY ACCESS & INDEPENDENCE, DIVISION OF REGIONAL CENTER OPERATIONS, PUEBLO REGIONAL CENTER,
Respondent.

Administrative Law Judge (ALJ) Susan J. Tyburski held the commencement hearing on February 17, 2016, and the evidentiary hearing on August 30 and 31, 2016, in this matter at the State Personnel Board (Board), Courtroom 6, 1525 Sherman Street, Denver, Colorado. The record was closed on September 2, 2016, after the exhibits admitted during the hearing were reviewed and redacted for inclusion in the record. Throughout the evidentiary hearing, Complainant appeared in person and was represented by her attorney, Mark Schwane. Respondent was represented by Davin Dahl, Assistant Attorney General. Respondent's advisory witness was Tracy Myszak, Director, Division for Regional Center Operations, and Complainant's Appointing Authority.

MATTER APPEALED

Complainant, a certified employee, appeals the termination of her employment effective November 2, 2015, arguing that this termination was arbitrary and capricious. She seeks all damages to make her whole, including but not limited to rescission and removal of the disciplinary action, reinstatement to her position of Health Care Technician I effective the date of her termination, an award of back pay and benefits, and an award of attorney fees and costs. Respondent argues that the action of the appointing authority should be affirmed, that all relief requested by Complainant be denied, and that Complainant's appeal be dismissed with prejudice.

For the reasons discussed below, Respondent's decision to discipline Complainant is **reversed**.

ISSUES

1. Whether Complainant committed the act(s) for which she was disciplined;
2. Whether Respondent's termination of Complainant's employment was arbitrary, capricious or contrary to rule or law; and
3. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

Background

1. Complainant was a certified state employee at Respondent's Pueblo Regional Center (PRC). She began working as a permanent part-time State Services Trainee II at the PRC on February 19, 2008. Complainant became a full time Health Care Technician I effective November 8, 2008, and remained in this position until the termination of her employment on November 2, 2015.

2. Health Care Technicians at the PRC train and assist residents in all aspects of daily living, engage residents in programs to develop skills and increase their independence, and administer medications and medical treatments.

3. PRC residents have intellectual and developmental disabilities. They range from high functioning individuals to those who require total 24/7 care, including assistance to eat, change clothes, go to the bathroom, etc. The residents live in group homes and, depending on their level of ability, participate in various programs during the day at different locations. Higher functioning residents are taken on field trips in the community, such as shopping trips to a local Dollar store, to assist them in the acquisition of life skills. Lower functioning residents go to day programs at a central building on the PRC campus, where staff members attempt to engage them in different activities.

4. Many of the PRC residents have difficulty communicating. As a result, the residents are very vulnerable to harm.

5. Pueblo Regional Center Policy 1.4.A.2 "prohibits abuse, neglect, exploitation, and mistreatment in any form to any individual receiving services." This policy includes specific procedures to be followed for an employee "witnessing, suspecting or hearing of any form of alleged abuse, neglect, mistreatment, or exploitation," including an immediate report to the "Emergency On Call" staff member, notification of the primary nurse or nurse on duty, a call to a hotline, and completion of an "Incident Report" before the end of the employee's shift. The policy further states:

Failure to report witnessed, suspected, or second party information regarding abuse, neglect, exploitation or mistreatment shall be considered as serious as the act itself, and may result in appropriate corrective or disciplinary measures, which may lead to legal action.

6. Samantha Trujillo is a Health Care Technician I at the PRC, and was hired to work at the PRC at the same time as Complainant in 2008. They are friendly, and have had some contacts outside work. Ms. Trujillo continues to work at the PRC.

7. Tifanee Brannen was hired as a new Client Care Aide (CCA) I at the PRC on or about February 17, 2015. She became interested in working with the PRC residents after interacting with some of them during field trips they made to her former place of employment, a Dollar store. Ms. Brannen explained that she had some experience with developmentally disabled individuals, as her sister has Down's syndrome and Ms. Brannen was involved with the Special Olympics.

8. Tracy Myszak was the Director of the Division for Regional Center Operations

and Complainant's Appointing Authority at the time Complainant's employment was terminated. Ms. Myszak oversaw three regional centers that provided residential and day programs for developmentally disabled individuals in Wheat Ridge, Grand Junction and Pueblo. She reported to Viki Manley, Director for the Office of Community Access and Independence.

Complainant's Performance Record

9. Prior to being terminated, Complainant had never received a corrective or disciplinary action for neglect, mistreatment or abuse of residents.

10. Beginning in March 2008 through at least March 2012, Complainant consistently received Level 2 performance evaluations. This level of performance is described as follows:

This rating level encompasses a range of expected performance. It includes employees who are successfully developing in the job, employees who exhibit competency in work behaviors, skills and assignments, and accomplished performers who consistently exhibit the desired competencies effectively and independently. These employees are meeting all the expectations, standards, requirements, and objectives on their performance plan and, on occasion, exceed them. This is the employee who reliably performs the job assigned and may even have a documented impact beyond the regular assignments and performance objectives that directly supports the mission of the organization.

11. In her April 2010 evaluation, Complainant's supervisor, Frank Padilla, rated Complainant a Level 3, the highest level, for the "core competency" of "customer service." Mr. Padilla noted: "[Complainant] always has the best interests of the individuals in the home. She goes above and beyond by spending her own money to purchase items for the individuals."

12. Complainant explained that the PRC residents were like "family" to her. Because some of the residents did not have the financial support that others did, she sometimes purchased items for them out of her own money.

13. In her March 2012 evaluation, Complainant's supervisor, Donna Skubal, noted: "[Complainant] does great on aiding individuals with their needs."

Ms. Brannen's Report of Alleged Abuse of Residents A and B¹

14. Complainant, Ms. Trujillo and Ms. Brannen were assigned to a "pool" of employees receiving different assignments at the beginning of each shift, rotating among the different residents and day programs. Ms. Brannen had recently completed two weeks of new employee training, and did not receive any "hands on" training before being placed in the employee "pool." March 3, 2015 was Ms. Brannen's second day of working with the residents, and her first day working with Complainant and Ms. Trujillo.

15. On March 3, 2015, Complainant, Ms. Trujillo and Ms. Brannen were assigned to supervise residents from Hahn's Peak group home participating in the Discovery Day program. This program was held in a room in one of two administrative buildings located on the PRC main campus. This room had a door to an enclosed outside area, and another door to a

¹ To protect the confidentiality of residents, this decision refers to the residents by letter only.

hallway with access to other program rooms. Other PRC staff members were present in the building and, at times, in the hallway during this Day program.

16. Ms. Brannen told Ms. Trujillo that she had been hired to work with a specific resident at the PRC. Ms. Trujillo informed Ms. Brannen that no one gets to work with just one or two individuals, and that working in the pool "was how it is." Complainant explained that working with different residents each day was helpful, as you could learn about all the different populations of developmentally disabled residents at the PRC.

17. Ms. Brannen did not believe being placed in a general pool, with different assignments each day, was beneficial to the residents. She described the day programs she worked in at the PRC as "terrible," as the residents were "getting nothing out of it" and were "not able to grow."

18. The Hahn's Peak house day program was short staffed on March 3, as the resident Therapy Assistant in charge of residents' programs was absent. Complainant and Ms. Trujillo attempted to engage the residents in activities, and took residents as needed to the bathroom. Because Ms. Brannen was a new employee, they did not ask her to supervise any residents' bathroom breaks.

19. Complainant explained that the PRC residents were like "family" to her. Because some of the residents did not have the financial support that others did, she sometimes purchased items for them out of her own money.

20. Neither Complainant nor Ms. Trujillo remembered anything unusual taking place during their supervision of the residents on March 3, 2015.

21. On March 5, 2015, two days after working with Complainant and Ms. Trujillo, Ms. Brannen went to talk with Dr. Sean Kelly, the licensed psychologist in charge of patient programs. Dr. Kelly worked under the supervision of the PRC Director, Valita Speedie.

22. Dr. Kelly was busy, so Ms. Brannen sat in her car to wait for him. She was feeling frustrated that Dr. Kelly was too busy to talk with her. While Ms. Brannen was waiting, she saw another PRC employee named "Saul." She told Saul that she had witnessed abuse of a couple of Hahn's Peak house residents during a day program. Saul took her to see Jo Kountz, the PRC's Quality Assurance (QA) investigator.

23. Ms. Brannen told Ms. Kountz that she witnessed abuse of two residents while working with Complainant and Ms. Trujillo on March 3, 2015. Ms. Brannen stated that Complainant threw toy blocks at Resident A and asked Ms. Brannen not to report her. When Resident A would not stop bothering Complainant, she pointed a pencil at him and threatened to slash his throat. Ms. Brannen also reported that Complainant placed a blanket over Resident A's head and forced him to lie down, hit him on the shoulder with her open hand, and kicked his leg after he kicked her.

24. Ms. Brannen further reported that, on March 3, 2015, Complainant pushed Resident B away from other residents and used a broom to move Resident B outside, hitting him on the back of his leg. Ms. Brannen reported that Ms. Trujillo was present, and did not do or say anything to stop these actions by Complainant.

25. Ms. Brannen did nothing to stop or report the abuse she allegedly witnessed until

two days later, on March 5, 2015.

26. Ms. Brannen expressed her general dissatisfaction with the overall conditions and resident treatment at the PRC. She stated that the PRC "was a big fat waste of taxpayer money." On March 9, 2015, Ms. Brannen submitted her resignation.

Initial Investigations of Ms. Brannen's Allegations

27. After receiving Ms. Brannen's report of alleged resident abuse, Ms. Speedie placed Complainant and Ms. Trujillo on paid administrative leave pending an investigation.

28. Ms. Speedie prepared a critical incident report that contained the following summary of Ms. Brannen's allegations:

On March 5, 2015 at approximately 4:00 P.M., a new staff member came to Quality Assurance and reported they had seen and heard abuse to a resident during Day Programming. The event had occurred on Tuesday, March 3rd, and the new employee was scared of retaliation hence the delay. The new [sic] staff stated that she had seen a staff member push a resident down onto a sofa, force the same resident to walk faster by "shooing" with a broom (like sweeping), and that this staff member had told the resident that he was gross and smelled and he better get away from her or she was going to "slit his throat" with a pencil she had in her hand. The new staff stated that the other staff member she reported on just stood by and did nothing.

29. Ms. Speedie subsequently clarified this report, stating: "The original Critical Incident Reporting form stated 'a resident.' This was in error. It should have stated two residents..."

30. The critical incident report contains the following description of the "current status and care" of the alleged victim(s):

The resident has no marks and does not appear distraught. There have been no other incident reports to indicate he has had any behaviors out of fear. This should have stated the "residents have". Neither resident is exhibiting any signs of distress or fear.

31. Ms. Kountz and Deputy Sheriff Douglas Gifford, Pueblo County Sheriff's Department (PCSD), conducted an investigation of Ms. Brannen's allegations by talking with the three individuals present on March 3, 2015: Complainant, Ms. Trujillo and Ms. Brannen. They also examined the alleged victims, who are essentially non-verbal and unable to be questioned. No physical or emotional injuries to the alleged victims were found.

32. When interviewed by Ms. Kountz, Ms. Brannen repeated her allegations concerning Complainant's abuse of residents A and B, and said that Ms. Trujillo "did nothing to stop this behavior." Ms. Brannen explained that "she did not report these incidents until a few days later, due to feeling of turmoil."

33. Ms. Kountz interviewed Complainant, who reported that March 3, 2015 was a "usual" day, and that five residents and three staff, including herself, were present in the day program. Complainant stated that a couple residents were "acting as they always do;

wondering [sic] in and out of the room to the outside fenced yard, yelling, and kicking." Complainant said "on one occasion she recalled [a resident] laying on the couch, yelling and kicking at a window and individuals as they walked by; she stated she told him to sit up on the couch. She reported no other physical or verbal contact with individuals."

34. Ms. Kountz also interviewed Ms. Trujillo, who stated that, on March 3, 2015, the residents "were behaving as they always do; pacing, kicking, intrusive with others, and walking in and out of the outside area." Ms. Trujillo reported that Complainant was "redirecting clients by standing in front of them in effort to redirect, however never pushing or hitting clients."

35. Ms. Kountz's QA investigative report concerning Ms. Brannen's allegations concludes that "abuse is not substantiated":

The allegations of abuse ... cannot be substantiated. Initial testimonial evidence from Tifanee Brannen revealed [unidentified residents] were physically and emotionally abused while at day program on 3/3/15. Further discussion with staff [Complainant and Ms. Trujillo] and lack of formal means of communications on part of alleged victims reveals a lack of corroborating evidence. Further, the lacking [sic] in physical evidence, such as visible injury on alleged victim's bodies, provides an additional lack of corroboration.

36. Because no evidence of injury to the alleged victims was found, the PCSD concluded that there was no basis for criminal charges under § 18-6.5-103(1)(c), C.R.S. The case was closed.

37. Following an investigation by the QA investigator and the PCSD, Ms. Speedie summarized the findings in the critical incident report, which was updated on March 13, 2015:

According to PRC's quality Assurance Report submitted to the Colorado Department of Health and Environment "The allegation of physical abuse involving [Resident A] and [Resident B] cannot be substantiated. Initial testimonial evidence from Tifanee Brannen revealed [Resident A] and [Resident B] were physically and emotionally abused while at day program on 3/3/15. Further discussion with staff [Ms. Trujillo and Complainant] and the lack of formal means of communication on the part of the alleged victims reveals a lack of collaborating [sic] evidence. Furthermore, lacking [sic] of physical evidence such as visible injury on the alleged victims [sic] bodies provides an additional lack of collaboration [sic]. The elements needs [sic] to substantiate physical abuse are as follows: "Intent OR Knowingly OR Recklessly. Bodily injury and serious bodily injury and/or unreasonable confinement or restraint." Based upon the preponderance of evidence and considering the noted elements abuse is not substantiated.

38. Complainant was notified on March 13, 2015, that she could return to work the next day. A hand-delivered letter to Complainant from Ms. Speedie stated: "I have received information from the Quality Assurance Department documenting that the allegations of MANE (mistreatment, abuse, neglect, exploitation) made against you were unsubstantiated." Ms. Speedie commended Complainant for her "professionalism during this time."

39. On her first day back at work, Complainant was returned to the same day program she supervised on March 3, 2015. No limits were placed on her contacts with

residents.

40. Ms. Speedie noted, in the section concerning "pertinent history" and "status" of "staff involved" in the critical incident report:

Ms. Tifanee Brannen, the staff who made the allegations, gave her two weeks notice on 3/9/15. She informed Ms. Traverso that she did not like working on the pool, that she gets attached to residents and then they move her, she said that she didn't realize that was the way the job was. Ms. Brannen, along with all applicants for the CCA position, were told this would be a pool position, that they would be moved to different homes and different shifts to meet the Agencies [sic] needs. Ms. Brannen indicated that she had heard that information but that she didn't realize it would happen. She filled out all of the paperwork and checked "personal reasons" and "dissatisfied with work conditions" as her reasons for leaving. She was asked several times if she was sure this was what she wanted to do and she indicated that yes, it was.

Second Investigation and Rule 6-10 Meeting

41. In March 2015, Respondent's managerial staff had increasing concerns over general allegations of resident abuse at the PRC, some of which appeared in the media. Viki Manley, Director of the Office of Community Access and Independence, asked Anthony Gherardini, a Deputy Director in the Office of Administrative Solutions and Emergency Manager for DHS, and a former Lakewood police officer, to review the initial investigative report concerning Ms. Brannen's allegations of abuse.

42. On March 16, 2015, Mr. Gherardini sent Ms. Manley an email observing that "[i]t seems odd that a new employee would make these allegations if they did not occur." He also noted: "It is concerning that other employees could not or would not corroborate the allegations. Either the events did not occur or were not observed. Most concerning would be the possibility that a culture that allows this behavior has developed." Mr. Gherardini concluded:

Both the law enforcement and CDPHE investigations seem sound at this point. As with many instances of abuse against vulnerable populations, those being abused cannot corroborate the abuse. The result of this is often one person's word against another, and in this case an additional staff member seems to support [Complainant's] assertion that she did not commit any abuse. Based on the information present, probable cause for an arrest did not exist, and if there is no probable cause, there is not enough evidence to create a preponderance in favor of finding that abuse occurred. Based on the information provided I have no issues with the QA or Police investigations.

Investigations involving these populations and behaviors are unconventional and rarely can be decided based on traditional interviews and after-the-fact information. Due to the fact that the potential victims cannot speak out on their own behalf, additional evidence must be gathered to prove cases of abuse.

43. To gather such "additional evidence," Mr. Gherardini recommended the use of hidden cameras or an investigator in the PRC.

44. Mr. Gherardini admitted that he based his opinions communicated in his March 16th email solely on the initial QA, PRC and PCSD investigative reports. He did not know what, if anything, Ms. Myszak did about the suggestions he made for gathering additional information about the practices at the PRC.

45. On March 24, 2015, Mr. Gherardini met with Adult Protective Services (APS) staff, who relayed concerns about the level of cooperation they received from the PRC's QA investigator and other PRC staff. Questions were also raised concerning whether Deputy Sheriff Gifford was as objective as he should have been in investigating alleged abuse at the PRC, due to his long-standing relationship with PRC staff. Mr. Gherardini relayed these concerns to Ms. Myszak.

46. Following concerns relayed by APS staff about the thoroughness of QA investigations at the PRC, Respondent decided to take certain actions to review conditions at the PRC, and reopen investigations that had been closed.

47. At the direction of Ms. Myszak, on March 24, 2015, Complainant was again placed on paid administrative leave by Respondent, along with Ms. Trujillo, Ms. Kountz, Ms. Speedie and Dr. Kelly.

48. On April 1, 2015, Ms. Speedie submitted her resignation as Director of the PRC, citing as one of her many reasons being "forced to respond to vague allegations by Ms. Manley and place a valued employee out on Administrative Leave."

49. Ms. Trujillo subsequently went on maternity leave, and returned to work after approximately eight months. There is no evidence indicating that Ms. Trujillo received any discipline as a result of this second investigation.

50. The PCSD investigation was also reopened and additional interviews of Complainant, Ms. Trujillo and Ms. Brannen were conducted by Detective Caitlin Howard in April, 2015.

51. Detective Howard testified that, other than reviewing information gathered during the prior PCSD investigation and re-interviewing the three witnesses, she did not conduct any additional investigation. She reasoned that, while Complainant and Ms. Trujillo had potential motives to lie, Ms. Brannen did not. Therefore, she concluded that Ms. Brannen's accusations of abuse provided "probable cause" to initiate criminal charges against Complainant.

52. On April 27, 2015, Detective Howard submitted a request to the 10th Judicial District Attorney's Office to charge Complainant with violating § 18-6.5-103(6), C.R.S., neglect of an at risk victim ("caretaker neglect"). Complainant was subsequently charged with two counts of misdemeanor caretaker neglect.

53. Ms. Myszak scheduled a Rule 6-10 meeting with Complainant on July 30, 2015. Complainant, Complainant's representative Jerry Solano, Ms. Myszak, and Ms. Myszak's representative Justin Icenhower, CDHS Human Resource Team Lead, attended this meeting.

54. During the July 30, 2015 meeting, Complainant again denied the allegations of abuse and neglect of residents A and B on March 3, 2015. When asked why Ms. Brannen would manufacture these allegations, Complainant said she did not know.

55. On August 11, 2015, Ms. Myszak interviewed Ms. Brannen by telephone. Ms. Brannen made the same allegations of abuse she had previously reported, and added that, because Complainant was “too good” to take residents to the bathroom, Ms. Brannen had to escort them. Ms. Brannen also stated that Complainant recognized Ms. Brannen from the Dollar store during visits with residents, and said: “It’s a lot different working with them all day as opposed to a few minutes at Dollar General.”

56. Complainant remained on administrative leave until her employment was terminated on November 2, 2015.

Termination Decision

57. Complainant’s employment was terminated by Ms. Myszak via a letter dated November 2, 2015. Ms. Myszak explained that she found Ms. Brannen’s claims to be credible because of the “specificity of her allegations and the lack of any reason for her to fabricate her account.” Ms. Myszak found Complainant’s “general denials not to be credible,” and concluded “that it is more likely than not” that Complainant committed the abusive acts alleged by Ms. Brannen. Ms. Myszak’s letter did not address Ms. Trujillo’s denial of Ms. Brannen’s allegations.

58. While Ms. Myszak reviewed Complainant’s eight-year satisfactory performance history, she concluded that it was outweighed by Complainant’s “knowingly and flagrantly” violating “the PRC Abuse, Mistreatment, Neglect, and Exploitation Policy and the expectations of [Complainant’s] position.” Therefore, she decided to terminate Complainant’s employment “effective immediately.”

59. Complainant filed a timely appeal of this termination decision postmarked November 9, 2015.

60. On July 11, 2016, Complainant entered into a stipulated plea agreement concerning her criminal charges. Her two “caretaker neglect” misdemeanor charges under § 18-6.5-103(6), C.R.S., were dismissed. Complainant pled guilty to § 18-9-103(1)(c), C.R.S., making “unreasonable noise in a public place or near a private residence that he has no right to occupy,” a class one petty offense, and received a deferred sentence on the condition that she complete community service and classes.

DISCUSSION

I. BURDEN OF PROOF.

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; § 24-50-101, *et seq.*, C.R.S.; *Dep’t of Institutions v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 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, Respondent has the burden to prove by a 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 706-708. The Colorado Supreme Court explained that, in attempting to justify a decision to discipline a certified public employee, this burden of proof is appropriate because "the appointing authority is the party attempting to overcome the presumption of satisfactory service" by the employee. *Id.* at 708, citing *State Civil Service Comm'n v. Hoag*, 293 P. 338, 342 (Colo. 1930). The Board may reverse or modify Respondent's decision to terminate Complainant's employment if this action is found to be arbitrary, capricious, or contrary to rule or law. § 24-50-103(6), C.R.S.

II. RESPONDENT FAILED TO PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THAT COMPLAINANT COMMITTED THE ACTS FOR WHICH SHE WAS DISCIPLINED.

Respondent had the burden to prove, by a preponderance of the evidence, that Complainant committed the abusive acts alleged by Ms. Brannen. To meet this evidentiary burden, Respondent relied on the testimony of Ms. Brannen. In contrast, both Complainant and her co-worker, Ms. Trujillo, denied that any abusive actions occurred.

The Colorado Supreme Court's decision in *Kinchen, supra*, involved allegations of client abuse at another state residential facility for the care and treatment of persons with developmental disabilities, and thus provides helpful guidance for weighing the evidence presented in the instant case. The Court noted that, in reaching a decision to terminate Mr. Kinchen, the employer solely relied on a determination that the investigator raising the allegations of client abuse was more credible than the employee accused of such abuse. The Court observed that Respondent failed to conduct a thorough investigation of the abuse allegations and failed to interview other staff members concerning the accused employee's "general demeanor and handling of clients." *Kinchen*, 886 P.2d at 709. As a result, the Colorado Supreme Court upheld the ALJ's conclusion that the employer failed to meet its burden of proving that the alleged abuse occurred, and that reversal of the termination decision was appropriate.

In the instant case, Ms. Brannen's allegations of resident abuse were contradicted not only by the testimony of Complainant, but also by the testimony of Ms. Trujillo, a co-worker who was present in the room during the day the alleged abuse occurred. Ms. Myszak provided no explanation as to why Ms. Trujillo, whose denial of Ms. Brannen's allegations of abuse was determined not to be credible, was allowed to return to work, apparently without being disciplined. In addition, Ms. Speedie contradicted Ms. Brannen's testimony about the reasons she provided for her resignation. While the testimony of Complainant, Ms. Trujillo, and Ms. Speedie was clear, consistent and credible, Ms. Brannen's failure to take any immediate action to stop the abuse she allegedly observed, her delay in reporting the alleged abuse, and her expressions of frustration and animosity towards the PRC and those who worked there, all raised questions about the credibility of her testimony. Complainant's eight-year record of consistently satisfactory service, containing specific observations by two different supervisors of Complainant's concern for the residents' "best interests" and attention to "their needs," casts further doubt on Ms. Brannen's accusations of abuse. This evidence, when combined with the direct contradiction of Ms. Brannen's testimony by the credible testimony of Complainant, Ms.

Trujillo and Ms. Speedie, renders Ms. Brannen's accusations of abuse not credible.

After considering all of the evidence presented, Respondent failed to meet its burden to prove, by a preponderance of the evidence, that Complainant committed the abuse alleged by Ms. Brannen. *Kinchen*, 886 P.2d at 709.

III. RESPONDENT'S DECISION TO TERMINATE COMPLAINANT'S EMPLOYMENT WAS ARBITRARY AND CAPRICIOUS.

In determining whether an agency's decision to discipline an employee 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 that after a consideration of the evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable persons fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

The preponderance of the evidence presented by the parties establishes that Respondent acted arbitrarily and capriciously, as those terms are defined in *Lawley*, 36 P.3d at 1252, in deciding to terminate Complainant's employment on November 2, 2015. In relying on Ms. Brannen's allegations of resident abuse, without engaging in a timely and fair investigation of those allegations, Respondent "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." *Id.* While under increasing pressure to address media reports of resident abuse at the PRC, Respondent failed to investigate why, after years of consistently satisfactory performance evaluations, Complainant would suddenly begin acting abusively towards residents she credibly described as "family," or why Ms. Trujillo could not confirm Ms. Brannen's allegations. Other than interviewing the three individuals present in the room or examining the alleged victims for evidence of injury, Respondent did not attempt to investigate the specific details of Ms. Brannen's accusations. Respondent did not ascertain what items were available in the room on March 3, 2015, or determine whether others present in the building witnessed Complainant's treatment of the residents, in order to determine whether those accusations were credible. *Kinchen*, 886 P.2d at 709.

In the absence of a timely and fair investigation of Ms. Brannen's allegations, Respondent's decision to terminate Complainant's employment was arbitrary and capricious. *Id.* Therefore, Respondent's decision to terminate Complainant's employment should be reversed, pursuant to § 24-50-103(6), C.R.S.

IV. COMPLAINANT'S DECISION TO ENTER A PLEA TO A PETTY OFFENSE WITH A DEFERRED SENTENCE DOES NOT DISQUALIFY HER FROM RETURNING TO WORK FOR RESPONDENT.

When Respondent reopened the investigation concerning the alleged abuse by Complainant on March 24, 2015, the PCSD also reopened its investigation. Complainant was ultimately charged with two counts of violating § 18-6.5-103(6), C.R.S., neglect of an at risk victim ("caretaker neglect").

Despite her professed innocence, Complainant credibly testified that, as a single,

unemployed mother of four children, she was unable to afford the attorney fees required to take the criminal charges against her to trial. As a result, in July 2016, she decided to accept a plea bargain. The two misdemeanor charges of "caretaker neglect" were dismissed. Instead, Complainant pled guilty to a violation of § 18-9-106(1)(c), C.R.S., making "unreasonable noise in a public place or near a private residence that he has no right to occupy," which is a class 1 petty offense under § 18-9-106(3)(a), C.R.S., with a deferred sentence.

Board Rule 6-12(A) provides, in pertinent part:

An employee who is charged with a felony or other offense of moral turpitude that adversely affects the employee's ability to perform the job, or may have an adverse effect on the department may be placed on indefinite disciplinary suspension without pay pending a final conviction. If the employee is not convicted or the charges are dismissed, the employee is restored to the position and granted full back pay and benefits. Department of Human Services' employees charged with an offense as defined in § 27-1-110, C.R.S., may be indefinitely suspended without pay pending final disposition of the offense.

In 2010, § 27-1-110, C.R.S., was repealed and replaced by § 27-90-111, C.R.S. Subsections (9)(b) and (c) of § 27-90-111, C.R.S., disqualify a person from state employment who has been sentenced pursuant to a conviction for specific felony and misdemeanor charges. None of the listed charges in these subsections include the ones with which Complainant was originally charged, and no petty offenses, such as the one to which Complainant pled guilty and received a deferred sentence, are listed as grounds for employment disqualification.

Because the original misdemeanor charges were dismissed against Complainant, § 27-90-111, C.R.S., does not prevent Complainant from returning to work for Respondent. Board Rule 6-12(A) states that, upon dismissal of those misdemeanor charges, Complainant should be "restored" to her previous position "and granted full back pay and benefits."

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

§ 24-50-125.5(1), C.R.S., provides, in pertinent part:

Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose ... was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless ... the department, agency, board, or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee ... against whom such personnel action was taken...

A frivolous personnel action is an action for which "no rational argument based on the evidence or law was presented." Board Rule 8-33(A). Personnel actions that are "in bad faith, malicious, or as a means of harassment" are actions "pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth." Board Rule 8-33(B). A groundless personnel action is one in which it is found that "a party fails to offer or produce any competent evidence to support such an action..." Board Rule 8-33(C).

There is no evidence in the record to suggest that Respondent's personnel action was frivolous or made in bad faith, maliciously, or as a means of harassment, as those terms are defined by Board Rule 8-33(A) or (B). Although Respondent failed to meet its burden of proving that Complainant committed the acts for which she was terminated by a preponderance of the evidence, its reliance on Ms. Brannen's allegations of abuse was not "groundless," as that term is defined by Board Rule 8-33(C). Therefore, Complainant is not entitled to an award of attorney fees and costs.

CONCLUSIONS OF LAW

1. Respondent failed to prove, by a preponderance of the evidence, that Complainant committed the acts for which she was disciplined.
2. Respondent's termination of Complainant's employment was arbitrary and capricious.
3. Complainant is not entitled to an award of attorney fees and costs.

ORDER

Respondent's action is **reversed** and the termination of Complainant's employment is rescinded. Complainant should be reinstated with full back pay and made whole for all lost benefits, with statutory interest.

Dated this 17th day
of October, 2016.



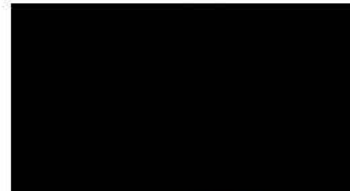
Susan J. Tyburski
Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 17th day of October, 2016, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

Mark Schwane, Esq.
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Jenney Reed



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.