

**STATE PERSONNEL BOARD, STATE OF COLORADO**  
Case No. **2021B022**

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**NOEL HIDALGO,**  
Complainant,

v.

**DEPARTMENT OF HUMAN SERVICES, COLORADO MENTAL HEALTH INSTITUTE AT PUEBLO,**  
Respondent.

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Senior Administrative Law Judge (ALJ) Susan J. Tyburski held the evidentiary hearing via web conference on January 26-27, 2021. The record was closed on January 29, 2021, after receipt of the parties' post-hearing briefs.

Throughout the hearing, Complainant appeared in person and through her attorney, Mark A. Schwane, Esq. Respondent appeared through its attorneys, Assistant Attorneys General Jacob W. Paul, Esq., and Amanda Swartz, Esq. Respondent's advisory witness was Yvette M. Pope, Complainant's appointing authority.

A list of exhibits admitted into evidence and a list of witnesses who testified at hearing are attached in an Appendix.

**MATTER APPEALED**

Complainant, a certified employee, appeals Respondent's termination of her employment. Complainant argues that she did not commit the alleged misconduct for which she was disciplined, and that Respondent's termination of her employment was arbitrary and capricious, and contrary to rule or law. She seeks reinstatement and back pay, and an award of attorney fees and costs.

Respondent argues that its termination of Complainant's employment should be affirmed, that all relief requested by Complainants should be denied, and that Complainant's appeal should be dismissed with prejudice.

At the conclusion of Respondent's case, Complainant argued that Ms. Pope was not Complainant's properly designated appointing authority, and that Ms. Pope's unauthorized termination of Complainant's employment should be reversed. The ALJ took this question under advisement, and continued with the hearing.

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

## **ISSUES**

1. Was Yvette Pope properly delegated appointing authority over Complainant?
2. Did Complainant commit the alleged misconduct for which she was disciplined?
3. If so, was Respondent's termination of Complainant's employment arbitrary, capricious, or contrary to rule or law?
4. Is Complainant entitled to an award of attorney fees and costs?

## **FINDINGS OF FACT**

### **Background**

1. Complainant worked for the Respondent at the Colorado Mental Health Institute at Pueblo (CMHIP) as a Client Care Aide II from March 16, 2015 to August 25, 2020. (Stipulated fact.<sup>1</sup>)

2. CMHIP is a forensic hospital that provides in-patient treatment for: (1) individuals with pending criminal charges who require competency evaluations, (2) individuals with pending criminal charges who have been found by a court to be incompetent to proceed, and (3) individuals found to be not guilty by reason of insanity.

3. On the date of the incident at issue in this case, January 20, 2020, Christine Tafoya (previously Ochoa), Psychosocial Program Chief Nurse, was Complainant's appointing authority. (Stipulated fact.)

### **Complainant's Performance History**

4. For the first five years of her employment, Complainant worked in a "pool," filling in where needed at the various units at CMHIP.

5. For the review period 4/1/2016 – 3/31/2017, Complainant received an overall Level 2 (Successful) rating.

6. Complainant received a corrective action on December 15, 2017, for using inappropriate language in front of patients.

7. Complainant received a 3-month disciplinary reduction in pay on March 21, 2018, for failure to complete training and other measures outlined in her prior corrective action.

8. For the review period 4/1/2017 – 3/31/2018, Complainant received an overall Level 1.5 (Needs Improvement) rating.

9. For the review period 4/1/2018 – 3/31/2019, Complainant received an overall Level 2 (Successful) rating. Her manager for this rating period, Frankie Martinez, noted: "Noel interacts effectively with staff and patients. Noel demonstrates effective interpersonal skills and makes

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<sup>1</sup> The parties stipulated to certain facts.

herself available to help others.”

10. On December 31, 2019, Complainant received a 3-month disciplinary pay reduction, primarily for attendance issues.

#### CMHIP’s Geriatric Unit

11. Sometime in November 2019, Complainant requested a transfer to the Geriatric Unit because liked working with the elderly patients. She began working in the Geriatric Unit in December 2019.

12. The Geriatric Unit involves more skilled care than other units, due to patients’ physical or behavioral issues. Patients in the Geriatric Unit require more staff monitoring and assistance with activities of daily living (ADLs).

13. In December, 2019, Ms. Tafoya was transferred to the position of Psychosocial Program Chief Nurse for six units, including the Geriatric Unit.

14. When Ms. Tafoya began working as the Program Chief Nurse for the Geriatric Unit, she was immediately inundated with a number of pressing issues, including various abuse investigations and employee grievances.

#### CMHIP’s Policy Re: Adult Patient Abuse/Neglect

15. CMHIP Policy No. 16.15 defines patient neglect and abuse, and outlines a process for investigating allegations of patient neglect and abuse.

16. CMHIP Policy No. 16.15, Section I requires “that all employees will treat all patients with dignity, courtesy and respect.”

17. CMHIP Policy No. 16.15, Section I (2) defines “patient abuse” as follows:

Patient abuse is any act, or omission of an act, that is inconsistent with prescribed patient care or treatment that violates the well-being or dignity of the patient and/or affects the patient detrimentally. This may include coercion exercised on a patient.

18. CMHIP Policy No. 16.15, Section I (2)(b) defines “verbal abuse” as follows:

Verbal abuse is any verbal communication that violates the well-being or dignity of the patient that places or attempts to place another person in fear of imminent serious bodily injury. Examples include but may not be limited to:

- i. yelling, harassment, intimidation, threats
- ii. cursing, foul language
- iii. racial or ethnic slurs
- iv. nicknames not requested by the patient, ridiculing, name-calling
- v. any remark that is intended to upset or provoke a negative response

19. CMHIP Policy No. 16.15, Section III (1) provides, in pertinent part:

Any employee witnessing, suspecting or learning of patient abuse or neglect

shall immediately report the incident to his/her immediate supervisor. Any employee who has knowledge of, or is witness to, suspected patient abuse or neglect and fails to report it is also responsible for patient abuse.

### The Persuasion Sequence

20. CMHIP staff have to deal with difficult patients who suffer from psychosis or exhibit antisocial behavior. Patients may be verbally or physically aggressive.

21. The “persuasion sequence” is used to persuade patients to engage in certain actions or behavior requested by CMHIP staff.

22. The “persuasion sequence” involves using an offer of a potential reward, such as a treat or privilege desired by the patient, to encourage positive behavior, and a warning of potential punishment, such as denial of a treat or a privilege, to discourage negative behavior.

23. CMHIP staff, including Complainant, have been regularly trained in using the “persuasion sequence.”

### Patient V.G.<sup>2</sup>

24. On December 15, 2019, V.G. was transferred to CMHIP’s Geriatric Unit from the county jail. He was paralyzed on his left side and received daily physical therapy to increase his strength and independence.

25. V.G. was younger than the geriatric patients and was not happy that he was in the Geriatric Unit. He was often angry and aggressive, and repeatedly threatened staff with the loss of their jobs. When he first arrived in the Unit, he threw his wheelchair legs at staff.

26. V.G.’s care plan included a commitment that he would perform daily living activities on his own as much as possible, with staff monitoring and assistance as necessary.

27. On the days that she was scheduled to work, Complainant assisted V.G. with his daily physical therapy sessions. The physical therapist informed Complainant that V.G. should be encouraged to do things for himself as much as possible in order to increase his strength and independence.

28. V.G. was frustrated that he was unable to do things for himself. He was classified as a fall risk because he would attempt to move in and out of his wheelchair without staff monitoring him.

29. Eugene Drawdy, a Correctional Officer with the Department of Corrections, was assigned as a one-on-one “sitter” for V.G. Officer Drawdy stayed with V.G. throughout the day to ensure that he did not injure himself.

### January 20, 2020 Toileting Incident

30. On the morning of January 20, 2020, Complainant and a co-worker, Jennifer Montoya, assisted patient V.G. with toileting. (Stipulated fact.)

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<sup>2</sup> The patient’s initials are used to protect his privacy.

31. This toileting incident occurred at approximately 9:20 a.m. in the Geriatric Unit's bathroom.

32. On January 20, 2020, patient V.G. had left side paralysis. (Stipulated fact.)

33. A bar is located on the left side of the toilet, which can be used by patients to pull themselves up.

34. Complainant and Ms. Montoya had each assisted V.G. with toileting on numerous occasions. They knew that V.G. could use the bar to pull himself up, and he had done so successfully a number of times.

35. Both Complainant and Ms. Montoya believed that encouraging V.G. to use the bar to pull himself up from the toilet was an important part of his ongoing physical therapy.

36. After V.G. finished using the toilet, Complainant and Ms. Montoya asked him to stand up so they could clean him.

37. V.G. did not want to pull himself up. Complainant and Ms. Montoya told V.G. it was part of his therapy to do as much as he could by himself. Complainant attempted to encourage V.G. by offering him a "Boost" drink that he liked.

38. V.G. became angry and pulled himself up using the bar, while Complainant monitored him.

39. When Ms. Montoya attempted to clean V.G., he yelled, "Don't fucking touch me," and tried to swing at her with his fist.

40. Complainant attempted to support V.G. on one side. Complainant warned V.G. that, if he tried to hit staff, he could be placed on "precautions" and lose privileges. V.G. continued to yell and swear at Complainant and Ms. Montoya.

41. A staff member alerted the Charge Nurse, Daniel Atencio, about the commotion in the bathroom. Mr. Atencio entered the bathroom and observed V.G. attempting to hit Complainant and Ms. Montoya.

42. Mr. Atencio assisted Complainant and Ms. Montoya to pull up V.G.'s pants and take him out of the bathroom.

43. As a result of V.G.'s aggressive behavior, Mr. Atencio recommended that V.G. be placed on "assault precautions."

44. Later that evening, V.G. told staff members on the evening shift that Complainant and Ms. Montoya had cursed at him, and Ms. Montoya threw a towel at him. He said he told them, "Alright, if you want an assault, I'll give you an assault," and showed the staff members "how he fisted up" at Complainant and Ms. Montoya.

Investigation of the Toileting Incident By Department of Public Safety (DPS)

45. Because of the allegations relayed by V.G. to the evening staff, the Department of Public Safety conducted an investigation of the toileting incident.

46. DPS Officer Jose Aveitia interviewed V.G. at approximately 10:00 p.m. on January 20, 2020. V.G. told Officer Aveitia that Complainant told him to stand up when he was finished using the toilet. He said he couldn't, and Ms. Montoya cursed and threw a towel at him. V.G. told Officer Aveitia that he then pulled himself up. Complainant and Ms. Montoya tried to help him get into his wheelchair, and "he moved his arm telling them to get away."

47. On January 21, 2020, Complainant completed a written police statement regarding the toileting incident with V.G. (Stipulated fact.) In this statement, Complainant wrote the following:

[V.G.] was taken to the bathroom after breakfast. [V.G.] stat [sic] himself down on the toilet. When finished Jenifer [sic] and I got ready to clean him up. [V.G.] was asked to grab the bar to stand up. [V.G.] refused. Informed him that it was a part of his therapy that he needed to help himself as much as he can. [V.G.] continued to refuse started to cuss at staff. [V.G.] ended up grabbing the bar and pulled himself up. As Jennifer went to clean him up, [V.G.] stated "Don't fucking touch me I can do it myself!" Jennifer handed him the washcloth and told him "here then do it yourself." [V.G.] went to grab the wash cloth to do it himself but wasn't able to. [V.G.] started to pull up his pants and almost lost balance...

48. On January 21, 2020, Ms. Montoya completed a written police statement regarding the toileting incident with V.G. In this statement, Ms. Montoya wrote the following:

During toileting time, I helped [V.G.] to use the bathroom along with another staff member. He stood up on the bar and sat himself on the toilet. When he said he was done I asked him to grab the bar and stand up. At that time he grabbed the bar and stated "Aren't you gonna fuck [sic] help me?" I told him that it was part of his plan to try and do it himself and that I work with him all the time and he needed to try. He got mad at me and pulled himself up all mad and lost his balance. So I went to grab his waist for support and he told me to get the fuck away from him and not to touch him and tried to swing at me with a closed fist. I was able to move in time and then I grabbed a washcloth to clean him. He said not to fuck'n touch him and get away from him so I said Okay here is the washcloth go ahead and wipe yourself. He took the washcloth and said leave me alone get the fuck out of here and wouldn't clean himself. His pants were then pulled back up and he was placed in his chair...

49. On January 21, 2020, Officer Drawdy submitted a written police statement. He stated that he was serving as a "sitter" from 7:00 a.m. until 2:30 p.m. on January 20, 2020, and sat with V.G. "several times throughout throughout the day." Officer Drawdy reported: "At no time did I hear or see staff say anything inappropriate to him, neglect him or mistreat him in any way."

Investigation of the Toileting Incident By Christine Tafoya

50. On January 21, 2020, Ms. Tafoya placed Complainant and Ms. Montoya on

administrative leave.

51. On January 23, 2020, Complainant completed a second written statement regarding the toileting incident with V.G. (Stipulated fact.) Complainant wrote the following:

[V.G.] was going to the bathroom. [V.G.] stood himself up and Jennifer and I pulled his pants down. [V.G.] sat there for about 5 min and said he was finished. Jennifer and I stood on both sides of his wheelchair. Jennifer told him to grab the bar and start to pull up. [V.G.] refused we informed him that it was a part of his therapy and treatment to do as much as possible. [V.G.] grabbed the bar and stood up. [V.G.] then started to turn to sit. Jennifer started to clean his behind [V.G.] stated, "Don't fucking touch me I can do it myself." As [V.G.] attempted to swing at staff. [V.G.] was faced towards the window so Jennifer handed him the wash cloth. [V.G.] could not keep balance so I touched his shoulder so he wouldn't fall. [V.G.] started to curs [sic] at me stating, "I told you not to fucking touch me. This is why I will sue this place."

52. In a February 11, 2020 meeting with Ms. Tafoya, Ms. Montoya stated that V.G. was "a very angry person" who had a history of threatening staff with their jobs. She denied that any abusive or unprofessional conduct occurred during the toileting incident.

53. Ms. Montoya's employment was not terminated because of the January 20, 2020 toileting incident.

#### Investigation of the Toileting Incident By Yvette Pope

54. Because there had been rumors circulating in the workplace concerning Complainant's alleged relationship with Ms. Tafoya's ex-husband, Ms. Tafoya decided it would be best if someone else handled the issue of potential discipline of Complainant.

55. On June 25, 2020, Ms. Tafoya delegated Appointing Authority over Complainant to Yvette M. Pope, Restoration Program Chief Nurse, as follows:

I am delegating specific appointing authority to you over Noel Hidalgo's investigation into allegations of patient abuse, to include the outcome and follow-up to the process as you deem appropriate.

56. Ms. Pope received copies of the incident and DPS reports obtained by Ms. Tafoya. Some of these documents contained Ms. Tafoya's comments.

57. Ms. Pope conducted her own investigation and did not confer with Ms. Tafoya about the toileting incident.

58. On June 26, 2020, Ms. Pope interviewed Robert Clarke, a Registered Nurse in the Geriatric Unit. Mr. Clarke informed her that V.G. "was a stay by with minimal assist." Mr. Clarke explained that V.G. "was about to stand up and sit down on his own but staff were present for safety and to provide minimal assist."

59. On June 29, 2020, Ms. Pope interviewed Mr. Atencio. Mr. Atencio informed her that he heard a "ruckus" involving a loud male voice coming from the bathroom. When he entered the bathroom, he saw V.G. resisting help from Complainant and Ms. Montoya. When they

attempted to touch him, he would “jerk away and threaten to report them for assault.” Mr. Atencio told Ms. Pope that he did not observe Complainant or Ms. Montoya cursing or “being inappropriate.”

60. On June 30, 2020, Ms. Pope interviewed Ms. Montoya. Ms. Montoya informed Ms. Pope that V.G. stood up on his own, allowed staff to pull down his pants, and sat on the toilet himself. After he finished, Ms. Montoya told him to stand up, and V.G. became angry. Ms. Montoya stated that, in the past, V.G. “independently without a problem gets himself on and off the toilet with minimal assist.” After V.G. stood up, Ms. Montoya attempted to clean him. V.G. became angry and swung at her.

61. On June 30, 2020, Ms. Pope interviewed Mr. Atencio a second time. He informed her that V.G. sometimes needed staff to “stand by” and sometimes “needed additional help.” He confirmed that all patients are encouraged to perform daily activities “to the best of their ability themselves.”

62. Ms. Pope did not interview V.G. because V.G. was no longer at CMHIP.

#### Rule 6-10 Meeting With Yvette Pope

63. On July 2, 2020, Complainant received a letter notifying her of a meeting to be held on July 13, 2020 with Ms. Pope pursuant to Board Rule 6-10. (Stipulated fact.)

64. On July 13, 2020, Ms. Pope held a Rule 6-10 meeting with Complainant. (Stipulated fact.)

65. Complainant was permitted to have representation of her choosing at the July 13, 2020 Rule 6-10 meeting. (Stipulated fact.)

66. During the Rule 6-10 meeting, Complainant explained that V.G. kept telling the physical therapist that he wanted to do things on his own “because he didn’t want to be dependent on people.” Complainant described V.G. as an angry, aggressive person. Complainant stated that, when he first arrived on the Geriatric Unit, “he was throwing his wheelchair legs at us.”

67. During the Rule 6-10 meeting, Ms. Pope cited the following language from V.G.’s plan of care: “I will complete my ADLs independently, to the best of my ability.”

68. Ms. Pope permitted Complainant at least five days following the July 13, 2020 Rule 6-10 meeting to provide any additional information. (Stipulated fact.) Complainant did not provide any additional information.

#### Discipline Decision

69. On August 25, 2020, Respondent terminated Complainant’s employment. (Stipulated fact.)

70. Ms. Pope signed the August 25, 2020 termination letter. (Stipulated fact.)

71. In the termination letter, Ms. Pope stated:

I believe it is more likely than not that you were verbally abusive and witnessed



a peer using inappropriate language when interacting with a patient, your interactions with the patient were unprofessional, a statement you made to the patient was intended to be intimidating versus part of the persuasion sequence, and you neglected to assist the patient despite his request.

72. Ms. Pope concluded that Complainant's actions constituted willful misconduct and violation of agency rules or laws that affect the ability to perform the job, pursuant to Board Rule 6-12(2).

73. Complainant filed a timely appeal of Respondent's termination of her employment.

### Complainant's Earnings

74. At the time of her termination, Complainant was earning \$2,537.92 per month from her employment with Respondent. (Stipulated fact.)

75. Complainant received an unemployment insurance benefit of \$493 per week from August 30, 2020 to November 1, 2020. (Stipulated fact.)

76. As of October 25, 2020, Complainant was employed by Target at one of its distribution centers. (Stipulated fact.)

77. Complainant was hired by Target as a seasonal employee, unloading boxes from trucks onto a conveyer belt.

78. Complainant earned \$17.65 per hour from her employment with Target.<sup>3</sup> (Stipulated fact.)

79. From October 25 through October 31, 2020, Complainant earned a total of \$448.84 from her employment at Target.

80. In early November 2020, Complainant, as well as her husband and child, were diagnosed with COVID-19. While they subsequently recovered, Target was unable to provide Complainant with more than a two-week leave. As a result, Complainant was unable to continue working for Target.

81. Complainant has applied for a number of jobs in the health care field, as well as service jobs at employers like Starbucks. She has been unable to find other employment.

## **ANALYSIS**

### **A. YVETTE POPE WAS PROPERLY DESIGNATED COMPLAINANT'S APPOINTING AUTHORITY.**

At the commencement of the hearing, the parties stipulated that, on January 20, 2020, Ms. Tafoya was Complainant's appointing authority. On June 25, 2020, Ms. Tafoya delegated appointing authority over Complainant in writing to Ms. Pope to investigate the toileting incident and determine whether to discipline Complainant.

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<sup>3</sup> This rate of pay was higher than the rate of pay Complainant was earning as a Client Care Aide II for Respondent.

At the conclusion of Respondent's case, Complainant argued that Ms. Pope was not Complainant's properly designated appointing authority. Complainant argued that there was no evidence of the scope of Ms. Tafoya's appointing authority at the time she delegated authority to Ms. Pope. Therefore, Complainant argued that Ms. Pope's termination of Complainant's employment was unauthorized and should be reversed.

Respondent argued that Ms. Tafoya's authority, as stipulated to by the parties, permitted her to delegate appointing authority to Ms. Pope to investigate the toileting incident and determine whether to discipline Complainant.

Board Rule 1-8 provides, in pertinent part: "An appointing authority may delegate in writing any and all human resource functions, including the approval of further delegation beyond the initial designee." The parties stipulated that Ms. Tafoya was Complainant's appointing authority; no exceptions to that authority were included in the parties' stipulation. Therefore, per this stipulation, Ms. Tafoya had the authority to designate Ms. Pope as Complainant's appointing authority to investigate the toileting incident and determine whether to discipline Complainant.

## **B. BURDEN OF PROOF.**

The Colorado Constitution guarantees that certified state employees "shall hold their respective positions during efficient service." Colo. Const. Art. XII, § 13(8). A certified state employee may be disciplined "only for just cause based on constitutionally specified criteria." *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 707 (Colo. 1994).

Section 13(8) lists the following specific criteria upon which discipline may be based:

... written findings of failure to comply with standards of efficient service or competence, or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude, or written charges thereof may be filed by any person with the appointing authority, which shall be promptly determined.

Colo. Const. Art. XII, § 13(8). State Personnel Board Rule 6-12 lists the following potential bases for discipline of certified employees:

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.

Section 27-90-111(15)(a), C.R.S., provides, in pertinent part:

In considering any disciplinary action under section 24-50-125(1) against an employee who is certified to any class or position in the state personnel system for engaging in mistreatment, abuse, neglect, or exploitation against a vulnerable person, the appointing authority shall give weight to the safety of

vulnerable persons over the interests of any other person.

Section 27-90-111(15)(b), C.R.S., provides:

If the appointing authority finds that the employee has engaged in mistreatment, abuse, neglect or exploitation against a vulnerable person, the appointing authority may take such disciplinary action as the appointing authority deems appropriate, up to and including termination, taking into consideration the harm or risk of harm to vulnerable persons created by the employee's actions. Nothing in this subsection (15)(b) affects the constitutional or statutory due process rights afforded to an employee who is certified to any class or position in the state personnel system.

The Colorado Supreme Court has clarified certified employees' rights in two crucial decisions. In *Kinchen*, the Supreme Court held that Respondent has the burden to prove by a preponderance of the evidence that the alleged misconduct on which the discipline was based occurred in a *de novo* hearing. *Kinchen*, 886 P.2d at 706-708. In discharging an employee, an appointing authority must establish a constitutionally authorized ground. *Id.* at 707. The ALJ is required to make "an independent finding of whether the evidence presented justifies a dismissal for cause." *Id.* at 706. 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.

The Colorado Supreme Court recently clarified the two-part inquiry required in an ALJ's review of a disciplinary action:

[I]n reviewing an appointing authority's disciplinary action, the ALJ must logically focus on two analytical inquiries: (1) whether the alleged misconduct occurred; **and if it did**, (2) whether the appointing authority's disciplinary action in response to that misconduct was arbitrary, capricious, or contrary to rule or law.

*Dep't of Corrections v. Stiles*, Case No. 19SC107, 2020 CO 90M, slip op. at pp. 20-21, par. 38 (December 21, 2020) (Emphasis added). The Colorado Supreme Court explained that the second analytical inquiry is necessary if the appointing authority establishes that the conduct on which the discipline is based occurred:

If the appointing authority establishes by a preponderance of the evidence that the alleged misconduct occurred, the Board or the ALJ must turn to the second analytical inquiry. At that stage, the Board or the ALJ must review the appointing authority's decision in accordance with the statutorily mandated standard of arbitrary, capricious, or contrary to rule or law.

*Dep't of Corrections v. Stiles*, slip op. at p. 22, par. 41. See also § 24-50-103(6), C.R.S.

**C. RESPONDENT FAILED TO ESTABLISH, BY A PREPONDERANCE OF THE EVIDENCE, THAT COMPLAINANT COMMITTED THE ALLEGED MISCONDUCT FOR WHICH SHE WAS DISCIPLINED.**

Ms. Pope terminated Complainant's employment for the following alleged misconduct: (1)

being verbally abusive to V.G., (2) witnessing a peer using inappropriate language when interacting with V.G. (and, presumably, failing to report this conduct), (3) unprofessional interactions with V.G., (4) making an intimidating statement to V.G. rather than using “the persuasion sequence,” and (5) neglecting to assist the patient despite his request. Ms. Pope primarily based these conclusions on two brief written statements made by V.G. She did not interview V.G. because, by the time she was delegated authority, V.G. was no longer at CMHIP.

The preponderance of the evidence establishes that V.G. was an angry, aggressive person. He was unhappy at being placed in the Geriatric Unit and frustrated with his inability to do things by himself. Ms. Montoya’s statements to Ms. Tafoya concerning V.G. in their February 11, 2020 meeting were consistent with Mr. Atencio’s testimony at the hearing concerning V.G. Both Ms. Montoya and Mr. Atencio stated that V.G. had a history of being angry and aggressive, complaining, and threatening to get staff fired. This evidence casts doubt on the credibility of V.G.’s allegations concerning Complainant.

In contrast to V.G., Ms. Pope concluded that Complainant’s account of the toileting incident was not credible. Ms. Pope believed that, because Complainant had been disciplined in December 2017 for using “inappropriate language,” she believed that Complainant was likely to have done so again. Ms. Pope testified that she considered herself to be an expert in reading people’s body language and determining when they were lying. She attained this expertise by watching and analyzing characters on television shows involving the police with her husband, who is a police officer. As a result, Ms. Pope concluded that Complainant’s body language indicated that Complainant was being deceptive.

The ALJ did not observe any specific body language during Complainant’s testimony that might lead to a conclusion that she was being deceptive. Moreover, using body language to evaluate credibility can lead to inaccurate, subjective conclusions. The ALJ did compare Complainant’s statements concerning the toileting incident to statements by other witnesses. While these witnesses described some different details about this incident, a number of consistent details emerged.

First, V.G.’s brief statements to Respondent’s staff and DPS Officer Aveitia corroborate certain details reported by Complainant and Ms. Montoya. V.G. told the evening staff that he had warned Complainant and Ms. Montoya, “Alright, if you want an assault, I’ll give you an assault.” He showed the staff “how he fisted up” at Complainant and Ms. Montoya. V.G. told Officer Aveitia that he “made a fist” and “moved his arm” to get Complainant and Ms. Montoya away from him. These statements by V.G. support Complainant’s, Ms. Montoya’s and Mr. Atencio’s statements that V.G. tried to hit Ms. Montoya. These statements also support Ms. Montoya’s and Mr. Atencio’s descriptions of V.G. as an angry and aggressive man who made threats towards staff. During his testimony, Mr. Atencio stated that V.G. had previously thrown his wheelchair legs at staff. Complainant informed Ms. Pope of this same behavior during their Rule 6-10 meeting.

None of the witnesses to the toileting incident support V.G.’s allegations that Complainant engaged in verbally abusive or unprofessional conduct. Both Complainant and Ms. Montoya deny that either of them cursed or made any verbally abusive comments. Mr. Atencio did not witness any abusive or unprofessional conduct by Complainant or Ms. Montoya. Correctional Officer Drawdy testified that he was unaware of any commotion occurring in the bathroom. Thus, the preponderance of the evidence does not establish that Complainant was “verbally abusive to,” or had “unprofessional interactions with,” V.G. The preponderance of the evidence also does not establish that Complainant witnessed Ms. Montoya using inappropriate language when interacting with V.G.

In addition to abusive or unprofessional conduct, Ms. Pope concluded that Complainant made “an intimidating statement to V.G. rather than using ‘the persuasion sequence,’” and neglected “to assist the patient despite his request.” In explaining the “persuasion sequence,” Ms. Tafoya described withholding a potential treat or privilege from a patient if the patient did not comply with a request. Complainant credibly testified that her warning to V.G. about being placed on precautions and losing privileges was intended to be part of the “persuasion sequence.” Complainant’s description of warning V.G. that he could lose privileges if he tried to hit staff was consistent with Ms. Tafoya’s description of withholding a privilege if a patient refused to comply with a request.

The preponderance of the evidence establishes that warning a patient of the loss of privileges for disruptive behavior is an appropriate part of the “persuasion sequence” that staff are instructed to use. Thus, warning V.G. about the potential consequences of assaulting staff does not meet the definition of “verbal abuse” prohibited by CMHIP Policy No. 16.15, Section I (2)(b).

Finally, the preponderance of the evidence establishes that Complainant did not neglect to assist the patient. Complainant credibly testified that V.G.’s physical therapist instructed her that V.G. should make his best efforts to do things for himself, such as standing up from the toilet. Ms. Montoya had a similar understanding. During Ms. Pope’s investigation, Mr. Atencio told her that all patients are encouraged to perform daily activities “to the best of their ability” themselves. Ms. Pope reviewed V.G.’s care plan, which contained a statement that V.G. would perform daily living activities on his own as much as possible, with staff monitoring and assistance as necessary. In addition, Mr. Clarke confirmed that V.G. “was about to stand up and sit down on his own,” and that staff should monitor him “for safety and to provide minimal assist.” Complainant’s statements consistently indicate that she monitored V.G. throughout the toileting incident, and took action to ensure he did not fall or injure himself. Complainant and Ms. Montoya both indicated that they had assisted V.G. with toileting on numerous prior occasions. On these other occasions, V.G. was able to stand up by grabbing the bar.

V.G. did not suffer any physical injury as a result of the toileting incident. Respondent’s decision not to terminate Ms. Montoya’s employment for the same incident indicates an absence of safety concerns resulting from staff’s conduct during this incident. V.G. was classified as a “fall risk” because of his continued attempts to move in and out of the wheelchair by himself, without staff monitoring him. V.G. was in the Geriatric Unit to increase his ability to increase his strength and independence; i.e., to perform daily functions like sitting down and standing up by himself. Under proper monitoring, like the monitoring provided by Complainant and Ms. Montoya during the toileting incident, V.G. was encouraged to perform functions like sitting down and standing up from the toilet by himself.

One of the essential functions of a *de novo* hearing is to permit the ALJ to evaluate the credibility of witnesses and other evidence. When conflicting evidence is offered in an administrative hearing, it is the role of the ALJ to assess the credibility of, and weigh, that evidence. See *Charnes v. Lobato*, 743 P.2d 27, 33 (Colo. 1987); *Colorado Ethics Watch v. City and County of Broomfield*, 203 P.3d 623, 626 (Colo. App. 2009). The provisions of § 27-90-111(15)(a) and (b), C.R.S., do not alter the responsibility of an ALJ to determine, *de novo*, whether a preponderance of the evidence establishes that a certified employee committed the alleged misconduct for which the employee was disciplined. See *Stiles*, slip op. at pp. 20-21, par. 38. Rather, as Respondent argues in its post-hearing brief, the provisions of § 27-90-111(15)(a) and (b), C.R.S., are relevant to a determination as to whether the appointing authority’s disciplinary decision was arbitrary and capricious, not to the initial determination as to whether alleged

misconduct occurred. See *Stiles*, slip op. at p. 22, par. 41.

After evaluating the various statements made by the witnesses in this case, the ALJ finds that Respondent has failed to establish, by a preponderance of the evidence, that Complainant committed the alleged misconduct for which she was disciplined.

#### **D. COMPLAINANT'S LOST WAGES.**

Complainant testified that, at the time her employment was terminated on August 25, 2020, she was earning \$2,537.92 per month, or \$634.48 per week. Complainant received an unemployment insurance benefit of \$493 per week for nine weeks, from August 30, 2020 to November 1, 2020. Thus, Complainant received \$4,437 in unemployment benefits.

Complainant obtained part-time seasonal employment at Target from to October 25 through October 31, 2020. Complainant earned a total of \$448.84. She had to leave that job because she, her husband and their child contracted COVID-19 in early November 2020. Complainant has since been unable to obtain work.

As of April 1, 2021, Complainant's lost wages from her prior position with Respondent will total \$18,399.92. After subtracting Complainant's unemployment benefits of \$4,437 and her wages of \$448.84 from her work for Target, Complainant's lost wages total \$13,514.08.

#### **E. COMPLAINANT IS 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).

As discussed above, Respondent failed to establish that Complainant committed the alleged misconduct for which she was disciplined. Ms. Pope's conclusions concerning Complainant's alleged misconduct were based, in large part, on her subjective assessment of Complainant's "body language" during the 6-10 meeting. These conclusions were not supported by an objective review of the preponderance of the evidence.

In *Coffey v. Colorado School of Mines*, 870 P.2d 608 (Colo. App. 1993), the Court of Appeals held that an award of attorney fees and costs "was mandated" where an ALJ reduced the school's disciplinary discharge of an employee to a three-day suspension. The Court explained that, even though the school established that Complainant engaged in misconduct that

justified a disciplinary suspension, the attorney fee award was statutorily “mandated” because the school had “no grounds” to discharge the employee. *Id.* at 609-610.

In the instant case, the preponderance of the evidence establishes that Complainant did not engage in misconduct, and that Respondent had “no grounds” to terminate Complainant’s employment. Because Respondent failed to produce competent evidence to support its decision to terminate Complainant’s employment, this action was groundless. Therefore, under § 24-50-125.5(1), C.R.S., Complainant is entitled to an award of attorney fees and costs.

### **CONCLUSIONS OF LAW**

1. Ms. Pope was properly designated Complainant’s appointing authority.
2. Respondent failed to establish, by a preponderance of the evidence, that Complainant committed the alleged misconduct for which she was disciplined.
3. Because Respondent’s personnel action was groundless, Complainant is entitled to an award of attorney fees and costs.

### **ORDER**

1. Respondent’s termination of Complainant’s employment is **rescinded**.
2. Respondent shall **reinstate** Complainant to her former position as a Client Care Aide II at the compensation level she would now hold had she not been terminated.
3. Respondent shall **reimburse** Complainant for her lost wages from August 25, 2020 to the date Complainant is reinstated to her former position. By April 1, 2021, the amount of back pay due Complainant will be \$13,514.08. This amount is subject to the employer’s PERA contribution, as well as interest of 8% per annum to the date of reinstatement.
4. Complainant is **awarded** reasonable attorney fees and costs attributable to her appeal. Complainant shall file a Bill of Attorney Fees and Costs no later than **March 22, 2021**. Respondent shall file a response within 10 days after receipt of Complainant’s Bill of Attorney Fees and Costs.

Dated this 1st day  
of March, 2021, at  
Denver, Colorado.

/s/   
Susan J. Tyburski  
Senior Administrative Law Judge  
State Personnel Board  
1525 Sherman Street, 4<sup>th</sup> Floor  
Denver, CO 80203

**CERTIFICATE OF SERVICE**

This is to certify that on the 1st day of March, 2021, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

Mark A. Schwane, Esq.  
[Mark@Schwanelaw.com](mailto:Mark@Schwanelaw.com)

Jacob W. Paul, Esq.  
Amanda C. Swartz, Esq.  
Assistant Attorneys General  
[Jacob.Paul@coag.gov](mailto:Jacob.Paul@coag.gov)  
[Amanda.Swartz@coag.gov](mailto:Amanda.Swartz@coag.gov)

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## **APPENDIX**

### **EXHIBITS**

**COMPLAINANT'S EXHIBITS ADMITTED:** The following exhibits were admitted into evidence: Exhibits B, E, J, N, P, V, W, X, Y, AA, BB, CC, DD. The following additional exhibit was admitted into evidence, has been designated as confidential, and shall be kept under seal: Exhibit EE.

**RESPONDENT'S EXHIBITS ADMITTED:** The following exhibits were admitted into evidence: Exhibits 1-27.

### **WITNESSES**

The following is a list of witnesses who testified in the evidentiary hearing:

Christine Tafoya, former Psychosocial Program Chief Nurse  
Yvette Pope, Restoration Program Chief Nurse  
Eugene Drawdy, Correctional Officer  
Nova Walker, Registered Nurse  
Noel Hidalgo, Complainant  
Daniel Atencio, Charge Nurse

## **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.