

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JON WALDROP,
Complainant,

v.

DEPARTMENT OF HUMAN SERVICES, GRAND JUNCTION REGIONAL CENTER,
Respondent.

Senior Administrative Law Judge (ALJ) Susan J. Tyburski held an evidentiary hearing in the above-captioned case on October 22, 2024 via Google Meet. Throughout the hearing, Complainant appeared via Google Meet, representing himself. Respondent appeared via Google Meet, through its attorney, Assistant Attorney General Monica M. Manning, Esq. Respondent's advisory witness was Scott Yoder, Respondent's Administrative Services Director. The record was closed on October 23, 2024 after receipt of Complainant's Exhibit F, which was admitted into evidence without objection by Respondent.

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

MATTER APPEALED

Complainant, a certified employee, appeals his disciplinary termination of employment by Respondent. Complainant argues that Respondent terminated his employment due to an incident for which Complainant had already received a corrective action. Complainant argues that Respondent's termination of his employment therefore violates Board Rule 6-7. Complainant seeks reinstatement with back pay and benefits.

Respondent argues that Complainant committed the offense for which he was terminated, and its disciplinary termination of Complainant was not arbitrary, capricious or contrary to rule or law. Respondent further argues that the remedy of reinstatement is barred by federal law.

For the reasons discussed below, Respondent's termination of Complainant's employment is **affirmed**.

ISSUES TO BE DETERMINED

- 1.) Did Complainant commit the act for which he was disciplined?
- 2.) Was Respondent's disciplinary action arbitrary, capricious, or contrary to rule or law? If so, what is the appropriate remedy?

FINDINGS OF FACT

Background

1. On or about March 7, 2022, Complainant began working at Respondent's Grand Junction Regional Center (GJRC) as a Health Services Trainee I. (Stipulated)
2. GJRC is an intermediate care facility providing services for individuals with intellectual disabilities. GJRC serves a diverse population, from people who have high abilities but are a high risk to themselves or others to people who have significant medical challenges. GJRC provides a range of services, including residential and health services, as well as mental health intervention. (Stipulated)
3. Complainant's duties as a Health Services Trainee I at GJRC included providing daily, direct care to the residents served by the facility. (Stipulated)
4. The residents at GJRC are "vulnerable persons ... susceptible to abuse or mistreatment" because they have intellectual disabilities, under the Vulnerable Persons Act, C.R.S. § 27-90-111(2)(e). (Stipulated)
5. GJRC receives federal funding pursuant to the conditions and requirements of Part 483.400 of Title 42 of the Code of Federal Regulations. 42 C.F.R. § 483.400, *et seq.* (Stipulated)
6. Every position at GJRC requires the employee filling that position to be clear of any substantiated Mistreatment, Abuse, Neglect or Exploitation (MANE) violation.

January 5, 2024 Incident

7. On January 5, 2024, Complainant's coworker, J. N.¹, witnessed Complainant leave a resident unattended in a bathtub while Complainant went to the bathroom. The resident had a known seizure condition which placed the resident at risk of harm or death by being left unattended. (Stipulated)
8. J.N. reported the incident. (Stipulated) On January 5, 2024, Complainant's appointing authority, Scott Yoder, Administrative Services Director of the GJRC, received the report and placed Complainant on administrative leave.

¹ The coworker is referred to by initials to protect the coworker's privacy.

9. Director Yoder investigated the incident by interviewing J.N. and Complainant. Complainant admitted to leaving the resident unattended in the bathtub despite knowing of the resident's seizure condition. (Stipulated)
10. The resident did not suffer any harm as a result of being left unattended in the bathtub. Director Yoder concluded that Complainant did not intend to cause the resident harm and did not commit a MANE violation. Because Complainant was an employee in good standing who had previously been open to coaching and had improved his performance, Director Yoder determined that a corrective action should be issued to Complainant.
11. On January 16, 2024, Director Yoder issued Complainant a corrective action for the January 5th incident. (Stipulated)
12. In the notice of corrective action, Director Yoder stated:

The purpose of this corrective action is to correct and improve your performance in the area of resident supervision and safety.

The specific action that necessitates this action: On January 5, 2024, while working at F1/4 group home, you were observed leaving the bathroom where a resident who is known to have seizures was bathing. Leaving a resident who is at risk for seizures alone for any period of time in a body of water is extremely dangerous and potentially life-threatening.

In order to correct your job performance and conduct, I have decided to take the following action:

1. Retraining of Mistreatment, Abuse, Neglect, and Exploitation (MANE), and providing me confirmation from your trainer that you understand the concepts. You will need to contact [name and phone number of trainer omitted] to schedule this training by February 2, 2024.
2. A written statement from you (at least one page) outlining the potential danger of your action and what you will do moving forward to avoid these situations in the future by February 7, 2024.

13. Director Yoder returned Complainant to work providing patient care on January 19, 2024.

February 27, 2024 CAPS Notice

14. On February 27, 2024, Colorado Adult Protective Services ("CAPS") notified GJRC leadership that, after investigating the January 5, 2024 incident, CAPS determined Complainant was a "perpetrator of physical abuse, sexual abuse, caretaker neglect, exploitation, or harmful act of an at-risk adult in accordance with APS regulation (12 CCR 2518-1)." (Stipulated)

15. CAPS typically does not inform GJRC or the suspected employee that CAPS is investigating an incident until it has reached a conclusion, which can occur months later. (Stipulated)
16. Upon receipt of the notice from CAPS, GJRC immediately placed Complainant on paid administrative leave. (Stipulated)

Respondent's Termination of Complainant's Employment

17. On March 13, 2024, Director Yoder sent Complainant a letter scheduling an information-gathering meeting pursuant to Board Rule 6-10. (Stipulated)
18. On March 29, 2024, Director Yoder met with Complainant to conduct the Rule 6-10 meeting. Director Yoder shared information about the CAPS report substantiating Complainant as a perpetrator of Mistreatment, Abuse, Neglect or Exploitation (MANE) of an at-risk adult and gave Complainant an opportunity to respond. (Stipulated)
19. Director Yoder did not receive a copy of an investigative report from CAPS or any information other than the fact that CAPS had determined Complainant was a "perpetrator of physical abuse, sexual abuse, caretaker neglect, exploitation, or harmful act of an at-risk adult in accordance with APS regulation (12 CCR 2518-1)."
20. Director Yoder assumed that the CAPS determination that Complainant was a MANE perpetrator was based on its investigation of the January 5, 2024 incident.
21. During the Rule 6-10 meeting, Complainant did not dispute the underlying facts of the January 5th incident or the determination made by CAPS. Complainant emphasized that CAPS concluded that little or no harm resulted from the January 5th incident. (Stipulated)
22. On April 26, 2024, Director Yoder terminated Complainant's employment due to the substantiated MANE finding by CAPS. (Stipulated)
23. On May 5, 2024, Complainant filed a timely appeal of his disciplinary termination with the Board, arguing that this disciplinary termination constituted "double jeopardy" in violation of Board Rule 6-7. (Stipulated)

Complainant's Income

24. Prior to the termination of his employment on April 26, 2024, Complainant earned an average of \$1,612.60 (gross) every two weeks.
25. After the termination of his employment, Complainant obtained employment with the U.S. Postal Service. Complainant resigned his employment with the U.S. Postal Service on October 12, 2024.

26. Prior to his resignation, Complainant earned the total gross amount of \$4,770.05 from the U.S. Postal Service. Complainant expects to receive a final paycheck from the U.S. Postal Service for 40 hours at \$18.62 an hour, totaling \$744.80 (gross).

ANALYSIS

The Colorado Supreme Court has explained 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, 477 P.3d 709, 717 (Colo. 2020). See also C.R.S. § 24-50-103(6).

I. COMPLAINANT COMMITTED THE ACT FOR WHICH HE WAS DISCIPLINED.

Complainant admits that he committed the alleged misconduct – leaving a patient subject to seizures alone in a bathtub on January 5, 2024. The parties stipulated:

On February 27, 2024, Colorado Adult Protective Services (“CAPS”) notified GJRC leadership that, after investigating the January 5, 2024 incident, CAPS determined Complainant was a “perpetrator of physical abuse, sexual abuse, caretaker neglect, exploitation, or harmful act of an at-risk adult in accordance with APS regulation (12 CCR 2518-1).”

II. RESPONDENT'S TERMINATION OF COMPLAINANT'S EMPLOYMENT WAS REQUIRED BY FEDERAL STATUTE.

Federal law prohibits the employment of an individual in a client care facility who has received a substantiated MANE finding. As an intermediate care facility receiving federal funding, GJRC is required to “prohibit the employment of individuals with a conviction or prior employment history of child or client abuse, neglect, or mistreatment.” 42 C.F.R. § 483.420(d)(1)(iii). Guidance provided by the U.S. Centers for Medicare & Medicaid Services explains that this prohibition applies to anyone with a “substantiated allegation of child or client abuse, neglect or mistreatment regardless of employment date.” This Guidance explains: “While facilities are not required to periodically screen existing employees, if the facility becomes aware that such action has been taken against an employee, the facility is required to prohibit continued employment.” The Guidance further provides:

Where the facility has terminated an employee based upon confirmation that abuse, neglect or mistreatment occurred during the employee's

performance, and the termination decision was overturned by either arbitration finding or a court finding, the employee must be returned to a position which does not involve direct contact between that employee and clients of the facility.

See State Operations Manual, Appendix J, Part II – Interpretive Guidelines – Responsibilities of Intermediate Care Facilities for Individuals with Intellectual Disabilities, Section W152, Guidance § 483.420(d)(1)(iii). Director Yoder credibly testified that this employment option does not exist at Respondent’s facility, as every position at this facility can only be filled by an individual who has no substantiated MANE violations.

Colorado law supports the termination of employees in the state personnel system who are unable to perform their duties due to a MANE violation. C.R.S. § 27-90-111(1) states: “It is the intent of the general assembly to minimize the potential for hiring and employing persons with a propensity toward abuse, assault, or similar offenses towards others that would provide them with unsupervised access to vulnerable persons.” Towards this end, C.R.S. § 27-90-111(15)(a) requires an appointing authority, in considering the discipline of a certified state employee for a MANE violation, to “give weight to the safety of vulnerable persons over the interests of any other person.” In addition, the Colorado Constitution provides, in pertinent part:

Persons in the personnel system of the state shall hold their respective positions during efficient service ... A person certified to any class or position in the personnel system may be dismissed, suspended, or otherwise disciplined by the appointing authority upon written findings of failure to comply with standards of efficient service or competence, or for ... willful failure or inability to perform his duties...

Art. XII, §13(8). See also C.R.S. § 24-50-125(1). Because Complainant, as a substantiated MANE perpetrator, could no longer provide “efficient service” or “perform his duties” at Respondent’s facility, Respondent’s termination of Complainant’s employment is not only required by federal statute, but is supported by Colorado law.

Complainant argues that Respondent’s decision to terminate his employment after receipt of the CAPS report was contrary to Board Rule 6-7, as this disciplinary action was based on the same incident or act for which Complainant received a corrective action on January 16, 2024. Board Rule 6-7 provides:

An employee may only be corrected or disciplined once for a single incident but may be corrected or disciplined for each additional act of the same nature. Corrective and disciplinary actions can be issued concurrently.

Respondent argues that its receipt of the CAPS report on February 27, 2024 constitutes a distinct occurrence from the January 5, 2024 incident. During the evidentiary hearing, Director Yoder testified that CAPS did not specifically identify the underlying incident that led to its determination that Complainant was a MANE

perpetrator. However, Director Yoder assumed that the CAPS determination was based on the January 5, 2024 incident for which Complainant received a corrective action. Director Yoder testified that he was not aware of any other incident involving Complainant that could have been the basis for the CAPS determination. A statement of the parties' stipulated facts submitted by Respondent prior to the hearing, quoted above, states that CAPS reached its determination that Complainant was a MANE perpetrator "after investigating the January 5, 2024 incident."

No evidence was presented that Complainant was involved in any incident that could have led to a MANE finding other than the January 5, 2024 incident. In the absence of such evidence, Respondent's argument that another such incident could exist is pure conjecture. The preponderance of the evidence establishes that, prior to his decision to terminate Complainant's employment, Director Yoder assumed that the CAPS determination that Complainant was a MANE perpetrator was based on the same January 5, 2024 incident for which Complainant had already received a corrective action. The imposition of discipline for an incident for which Complainant had already received a corrective action appears to violate the plain language of Board Rule 6-7. However, as discussed above, Board Rule 6-7 is not the only authority relevant to Respondent's disciplinary decision.

C.R.S. § 24-4-103(8)(a) provides, in pertinent part: "Any rule or amendment to an existing rule issued by any agency ... which conflicts with a statute shall be void." Board Rule 6-7, as applied in this case, conflicts with 42 C.F.R. § 483.420(d)(1)(iii). See also *Ettelman v. Colorado State Bd. of Accountancy*, 849 P.2d 795, 798 (Colo. App. 1992) (holding that "any regulation that is inconsistent with or contrary to a statute is void.") Because the application of Board Rule 6-7 conflicts with the requirements of 42 C.F.R. § 483.420(d)(1)(iii), the federal statute renders Board Rule 6-7 void under the circumstances of this case.

Under 42 C.F.R. § 483.420(d)(1)(iii), Complainant's receipt of a substantiated MANE violation prohibits Respondent, as a recipient of federal funds, from employing Complainant. Because Complainant can no longer serve in or perform the duties of any position with Respondent, Respondent's termination of Complainant's employment is supported by Art. XII, §13(8) of the Colorado Constitution and C.R.S. § 24-50-125(1). Therefore, Respondent's termination of Complainant's employment was not arbitrary, capricious, or contrary to rule or law, and should be affirmed.

CONCLUSIONS OF LAW

Complainant committed the act for which he was disciplined, and Respondent's disciplinary action was not arbitrary, capricious, or contrary to rule or law.

ORDER

For the above reasons, Respondent's termination of Complainant's employment is **affirmed**.

Dated this 4th day of
November, 2024, at
Denver, Colorado.

/s/ [REDACTED]
Susan J. Tyburski,
Senior Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the 4th day of November, 2024, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** and the attached **NOTICE OF APPEAL RIGHTS** as follows:

Jon P. Waldrop
[REDACTED]

Monica M. Manning, Esq.
Assistant Attorney General
Monica.Manning@coag.gov

[REDACTED]

APPENDIX

EXHIBITS

JOINT EXHIBITS ADMITTED: The following joint exhibits were stipulated into evidence: 2, 3, 4, 7, 10.

COMPLAINANT'S EXHIBITS ADMITTED: The following exhibits were stipulated into evidence: D, E. The following additional exhibit was admitted into evidence without objection: F.

RESPONDENT'S EXHIBITS ADMITTED: The following exhibits were stipulated into evidence: Exhibits 1, 5, 6, 8, 9, 11.

WITNESSES

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

Scott Yoder, Respondent's Administrative Services Director
Jon Waldrop, Complainant

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 served to the parties. § 24-4-105(15), C.R.S. and Board Rule 8-53(A)(2).
3. 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 served to the parties. §§ 24-4-105(14)(a)(II) and 24-50-125.4(4), C.R.S. 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. 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. Univ. of S. Colo.*, 793 P.2d 657 (Colo. App. 1990) and § 24-4-105(14) and (15), C.R.S.
4. The parties are hereby advised that this constitutes the Board's motion, pursuant to § 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. Board Rule 8-53(C). 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. 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. See Board Rule 8-53(A)(5)-(7). For additional information contact the State Personnel Board office at (303) 866-3300 or email at dpa_state.personnelboard@state.co.us.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is served 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 8-54.

ORAL ARGUMENT ON APPEAL TO THE BOARD

In general, no oral argument is permitted. Board Rule 8-55(C).

MOTION FOR RECONSIDERATION

Motions for reconsideration are discouraged. See Board Rule 8-47(K).