



# Maine Human Rights Commission

# 51 State House Station, Augusta, ME 04333-0051

*Physical location: 19 Union Street, Augusta, ME 04330*

Phone (207) 624-6290 ▪ Fax (207) 624-8729 ▪ TTY: Maine Relay 711

[www.maine.gov/mhrc](http://www.maine.gov/mhrc)

Amy M. Sneirson  
EXECUTIVE DIRECTOR

Barbara Archer Hirsch  
COMMISSION COUNSEL

## INVESTIGATOR'S REPORT

E14-0481

April 24, 2016

**Brian Downing (Auburn)**

v.

**Select Rehabilitation, Inc. (Northfield, IL)**

### **I. Complainant's Complaint:**

Complainant Brian Downing alleged that Respondent Select Rehabilitation, Inc. ("Select") retaliated against him by terminating his employment for engaging in protected activity, specifically making a complaint about Medicare billing practices.

### **II. Respondent's Answer:**

Select denied retaliating against Mr. Downing and stated that it received complaints that Mr. Downing was generally unprofessional and negative during working hours, was disrespectful to two physicians, and failed to follow instructions regarding discussing concerns about his performance with staff.

### **III. Jurisdictional Data:**

- 1) Dates of alleged discrimination: December 2013 through January 14, 2014.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): September 11, 2014.
- 3) Respondent has approximately 3,500 employees and is subject to the Maine Human Rights Act ("MHRA") and the Maine Whistleblowers Protection Act ("WPA"), as well as state employment regulations.
- 4) Complainant is represented by Rebecca Webber, Esq. Respondent is represented by Diane Gianos, Esq.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties, a Fact Finding Conference ("FFC"), and telephone interviews. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" here.

### **IV. Development of Facts:**

- 1) The parties in this case are as follows:

- a) Mr. Downing worked for Select from January 1, 2013, until January 14, 2014, when Select discharged him.
  - b) Select Rehabilitation provides physical, occupational, and speech therapy services to clients.
- 2) Complainant provided the following in support of his position:
- a) When Mr. Downing began working for Select, he was given permission by the Regional Vice President ("VP") and the Regional Manager ("Manager") to continue working per diem with another company. They agreed that he would complete work for his other employer after he finished working for Select, but on occasion, he could split up his day as long as he completed his nine hours of work for Select.
  - b) In early 2013, Mr. Downing noticed that Select put into place a system that delayed patients from being discharged or denied them discharge all together. This kept clients on therapists' caseloads for longer and made the therapists uncomfortable because the practice could be construed as fraud since Medicare was being billed for services that patients no longer needed. Select would also get to keep the money collected for the Medicare patients.
  - c) In March 2013, Mr. Downing expressed his concerns about the discharge practices to Manager, including telling Manager he considered the practice to be fraud. Manager told Mr. Downing that if the therapists were filling out the discharge checklist for their patients, there would be no reason for Select not to discharge the patients.
  - d) In June and July 2013, the delays in discharging patients became worse because Select added another employee who made the decisions about discharge. This employee did provide explanations for his decisions, which was an improvement.
    - i. The employee was removed from the discharge process after Select found out that the therapists were keeping copies of emails that explained why patients were not being discharged.
  - e) Over the next six months, Mr. Downing had at least two more conversations with Manager about Select's discharge practices.
  - f) In June 2013, an acquaintance ("Employee 1") asked Mr. Downing for a referral to work for Select. He had concerns about her working for Select based on their past interactions, but agreed to provide the referral. She began working for Select in July 2013.
  - g) In November 2013, Mr. Downing's supervisor resigned, and Employee 1 applied for the position. Due to his history with her, Mr. Downing spoke with Manager about his concerns about Employee 1 as a supervisor. Employee 1 was hired in the supervisor position at the end of the month.<sup>1</sup>
  - h) On December 12, 2013, Mr. Downing left Employee 1 a post-it note to let her know he would be leaving at noon instead of when his shift ended to take care of a patient for his other employer. Employee 1 did not come into the office until around 9:00 a.m., and Mr. Downing was already working with patients. Therapists do not have email, so the only methods they had to communicate with Employee 1 were to

---

<sup>1</sup> Mr. Downing had a meeting with Manager where Manager asked him if he was going to accept Employee 1 as his supervisor. Mr. Downing told him that he would be respectful, but that he needed Manager's support if Employee 1 let her personal animosity towards him affect how she treated him. Manager said that he would support Mr. Downing.

call her in the office or speak to her when they saw her. There was no formal process for how employees were supposed to communicate with Employee 1 when she was not in the office.

- i. Post-it notes were frequently used by Employee 1 to inform employees of schedule changes or to notify them of things related to their patients.
  - ii. When Mr. Downing saw Employee 1 at 9:10 a.m. that morning he apologized for the short notice that he had to leave at noon.
- i) During his conversation with Employee 1, she asked him to give her notice of schedule changes the night before. During the same conversation, she asked for 24 hours' notice of schedule changes. No one with Select had ever raised this issue with Mr. Downing until Employee 1 did that day. Mr. Downing told her that what she was saying was confusing. Her response was that was "bullshit."
- i. Generally Mr. Downing would see patients for his other employer after working for Select, but occasionally he saw these patients during the work day. It never caused a scheduling conflict, and there was no agreement that Mr. Downing could only see patients for his other job after Select's work day.
- j) Later that day, Employee 1 apologized for her comments during the discussion with Mr. Downing. She also clarified that she would like advance notice if he had to leave the facility to treat a patient for his other employer.
- k) Mr. Downing did not schedule another visit for his other employer during Select hours after this event occurred.
- l) In early December 2013, Employee 1 told the team of therapists that Manager would not approve discharge requests unless there was another Medicare patient to replace the patient being discharged. Mr. Downing told Employee 1 that doing that would be inappropriate and sounded like fraud. Employee 1 did not respond.
- m) On December 16, 2013, Mr. Downing met with Manager about several issues he had with Employee 1, including his concern about how she was removing patients from the schedule. After they talked, Manager invited Employee 1 to the discussion. At the end of the conversation, Manager clarified a practice that allowed the therapists to provide information about a patient if a physician asked for it. This was not a reprimand or counseling.
- i. Mr. Downing was not counseled or told that his post-it note to Employee 1 on December 12, 2013 was unprofessional during this meeting. Part of the discussion involved the problem that arose from Employee 1 leaving post-it notes for the therapists. Manager told Employee 1 to communicate with the staff face-to-face. He also told Mr. Downing that if Employee 1 wanted 24-hour notice, Mr. Downing should do the best he could to notify her of changes. Manager also told Mr. Downing and Employee 1 that they needed to improve their communication.
- n) On January 9, 2014, Mr. Downing was on a conference call with VP and Manager. During the call, VP told Mr. Downing that he had heard that Mr. Downing made negative comments to the nursing department. VP told Mr. Downing that he was a good therapist, and that he wanted Mr. Downing to continue to work at the facility. Mr. Downing stated that the only negative comments he made about Select related to the discharge policy. VP did not respond.

- o) On January 10, 2014, Mr. Downing went to speak to the Director of Nursing ("DON") and another nurse because he was worried about what VP had said in the conference call. The nurses confirmed that neither of them had told VP that Mr. Downing had made negative comments.
  - i. Mr. Downing told Manager about his conversation with the two nurses. Manager told Mr. Downing that VP was the one who said that he had spoken with the nurses regarding the alleged negative comments. Mr. Downing did not believe that VP had spoken with the nurses at all.
- p) On January 14, 2014, Manager asked Mr. Downing to meet with him. During the meeting, Manager showed Mr. Downing two documents, one that was a verbal warning notice and the other that was a written warning notice, both dated January 14, 2014. Manager told Mr. Downing that VP told him to draft the documents. Mr. Downing disputed the allegations in the warnings, and he did not sign the warnings.
- q) Manager told Mr. Downing that he would have to speak with VP before going forward.
- r) Mr. Downing worked the rest of his shift. As Mr. Downing was leaving, Manager terminated his employment. Mr. Downing asked why he was being discharged, and Manager replied that it was because Mr. Downing had spoken to one of the nurses without permission and because he refused to sign the warning documents. Mr. Downing stated that he had not refused to sign the warnings, and that he did not even see them when he met with Manager. Manager responded stating, "I know. This decision is not mine."
  - i. This was the only conversation Mr. Downing had related to his discharge.
- s) The warnings that were the alleged basis for Mr. Downing's termination from employment included the following:
  - i. Leaving Employee 1 a post-it on December 12, 2013, to let her know that he had to leave at noon for an appointment for his other position. The warning reminded Mr. Downing that Select was his employer. The warning also included the fact that post-it notes were not the appropriate form of communicating with Employee 1. Mr. Downing stated that he communicated with her by using post-it notes because therapists did not have email, he did not have her cell phone number, and employees often used post-it notes to communicate with each other and Employee 1.
  - ii. Mr. Downing was also warned for providing a referral for a chair for a patient without going through the proper procedures. Mr. Downing denied that he did so, and also stated that he had attempted to get the referral through the correct process, but Employee 1 would not allow him to do so. He told the nurse involved that he was not making a therapy recommendation, and if they wanted to use the chair it would have to be a nursing decision.
  - iii. Mr. Downing was also warned for telling a physician that he could not answer questions about a resident. Employee 1 was present during the conversation with the physician. At the time, she agreed with Mr. Downing and reiterated what he had told the physician.
  - iv. Mr. Downing was warned about making negative comments. Mr. Downing stated that the incident in the warning never occurred and that another employee was actually the one who had made the comment at issue.
  - v. There was also another incident where Mr. Downing allegedly made a comment in a condescending manner. Mr. Downing stated that everyone spoke in the manner he did on that occasion, but no one else had been written up.

- vi. Finally, Mr. Downing was alleged to have been unprofessional and negative to two physicians. Mr. Downing followed up with one of the physicians by email who told Mr. Downing that he did not think Mr. Downing had been disrespectful to him.
  - t) Mr. Downing received a letter from the Director of Human Resources ("Director"), which stated that she had discussed the reasons of his discharge with him. Mr. Downing had not spoken with Director about his termination.
- 3) Respondent provided the following in response to Complainant's allegations:
- a) With regard to the patient discharge issue, during the FFC Manager stated that Mr. Downing felt that discharges took too long. Manager told Mr. Downing that Select had a discharge checklist that was implemented and that he should follow the guidelines on the checklist. Manager did not recall when Mr. Downing spoke to him about his concerns about the discharge procedure, but stated that Mr. Downing did not complain about fraudulent billing.
    - i. At the FFC, VP stated that Mr. Downing had brought his concerns about the discharge practices to Manager, who then spoke with VP about it. Select created a new discharge checklist to make sure patients were meeting maximum potential. There was no discussion about fraudulent billing.
  - b) On December 12, 2013, Mr. Downing left a post-it note for Employee 1 which said that he would be leaving the facility at noon to do work for his other employer. Mr. Downing was counseled that his method of communication was unprofessional and disrespectful. He was also reminded that he must provide sufficient notice to Select before leaving the facility, and he was reminded that he needed to complete his duties prior to leaving the facility each day.
    - i. At the FFC, Manager stated that when Mr. Downing was first hired, there was a discussion about when he would do work for his other employer. The work was supposed to be done after Select's hours were completed, but Mr. Downing was allowed to do work during the day occasionally, as long as he informed his supervisor.
  - c) There were no incidents prior to December 2013 where Mr. Downing was seen as unprofessional, negative or insubordinate. At the FFC, Manager stated that there was a lot of disrespect shown by Mr. Downing, but nothing was written up. Manager had a meeting with the Administrator of the facility who felt that Mr. Downing presented a negative attitude. For example, the Administrator would notice in Mr. Downing's demeanor that he did not appear to be happy.
  - d) On December 16, 2013, Mr. Downing was counseled regarding his poor communication skills with Employee 1. He was also counseled regarding appropriate communication with physicians about patient discharge, consistent with a new policy that had been implemented. Mr. Downing received a verbal warning and was told that he needed to improve his conduct immediately, and that if he failed to do so he could face further disciplinary action up to and including termination.
    - i. At the FFC, Manager stated that he spoke with both Mr. Downing and Employee 1 about their communications issues. It was a verbal discipline where he noted the behaviors needed to stop. Both stated they would work on it. At the FFC, VP stated that Employee 1 would not have been written up related to the December 16, 2013 discussion because there was no issue for Employee

- 1 to leave post-it notes for schedule changes, but staff should not be leaving post-it notes when they needed to leave the building. There is no policy regarding use of post-it notes.
- ii. With regard to the incident where Employee 1 used profanity towards Mr. Downing, she did not receive any discipline for that behavior but was told that it would not be tolerated.
- e) Despite being counseled, Mr. Downing continued to violate Select's policies.
  - f) On January 3, 2014, Mr. Downing made a recommendation to a nurse without a physician's order and without conducting an assessment relating to services for a patient. Mr. Downing's conduct violated Select's procedures for treating patients as well as its code of conduct policy. When Employee 1 confronted Mr. Downing about the situation, he was argumentative and unprofessional.
  - g) On the same day, Employee 1 informed Manager that Mr. Downing responded in an unprofessional and disrespectful manner to a physician which was perceived in a passive-aggressive way. Employee 1 also stated that Mr. Downing refused to answer a physician's questions about the status of a resident despite Manager counseling him earlier to provide this information. Mr. Downing was disrespectful to the physicians and portrayed a negative attitude that was unsupportive of Select.
    - i. Neither Manager nor VP spoke with either of the physicians involved to find out their side of the story.
  - h) On January 9, 2014, VP counseled Mr. Downing regarding his behavior on January 3, 2014. VP told Mr. Downing that his negative attitude and unprofessional conduct were unacceptable and that he must improve his attitude immediately. VP again counseled Mr. Downing that he needed to provide physicians with information about residents' progress and refer questions about discharge to the appropriate individual. VP also directed Mr. Downing not to discuss his counseling with any other members of the facility.
  - i) On January 10, 2014, Mr. Downing violated VP's directive not to talk to others about his counseling by talking to the DON and another nurse about it. The DON felt threatened because when Mr. Downing entered he closed the door behind him and stood in front of the door, blocking it. Mr. Downing interrogated the DON, asking whether anyone had complained to her that he was making negative statements about Select. The DON told Mr. Downing that she felt that he lacked professionalism when telling physicians he was not able to have conversations about their patients.
  - j) Due to Mr. Downing's conduct, he was issued a written warning on January 14, 2014, which he refused to sign.
  - k) On January 14, 2014, Manager met with Mr. Downing to present him with the warning notices.
    - i. Manager had met with the Administrator that morning to discuss Mr. Downing. During the discussion it came up that Mr. Downing had a negative demeanor and there were complaints from other departments in the facility about his demeanor.
  - l) When Manager met with Mr. Downing to show him the warnings, Mr. Downing looked at them and stated that he was not going to sign them and that he wanted to talk with VP.

- i. At the FFC, Manager stated that Employee 1 had received the same verbal warning as Mr. Downing had on December 16, 2013, but her verbal warning was not written up and given to her like Mr. Downing's was. Manager stated that the delay in giving Mr. Downing the verbal warning notice in writing was because he was not aware that he had to. VP told Manager to write up the verbal warning to Mr. Downing. Manager further stated that he did not write a verbal warning notice for Employee 1 for the same incident because he was focused on the written warning for Mr. Downing.<sup>2</sup>
  - m) Manager stated that he was instructed to give Mr. Downing the warnings, and did not terminate Mr. Downing's employment during the meeting because he was waiting to get direction from VP.
    - i. At the FFC, Manager stated that VP told Manager the weekend prior to January 14, 2014, that Mr. Downing's employment was going to be terminated.
    - ii. At the FFC, VP stated that the decision to terminate Mr. Downing's employment was made on January 14, 2014.
  - n) At the FFC, VP stated that Mr. Downing's employment was terminated because the Administrator had concerns about judgmental comments made by Mr. Downing about the facility; because multiple people reported that Mr. Downing was talking about things he was instructed not to talk about; and because of the incident in the DON's office. Manager informed VP about the incident in the DON's office, and then VP spoke with the Administrator about it. Neither Manager nor VP spoke with the DON about the incident.
  - o) At the FFC, VP stated that he, Director, and Manager spoke with Mr. Downing by phone on January 14, 2014 to tell him that he was discharged. VP stated that Manager was responsible for coordinating the conference call with Mr. Downing.
    - i. In a follow-up interview after the FFC, Manager stated that he did not recall being part of a phone call with VP and Director terminating Mr. Downing's employment. He thought maybe it could have been just VP and Director. Manager also stated that he had terminated Mr. Downing's employment on January 14, 2014, and only he and Mr. Downing were present.
- 4) Investigator's Notes:
- a) Select's Code of Conduct states, "Reporting. Employees must report any suspected violations of laws or regulations regarding healthcare programs, or of Select Rehabilitation company policies and procedures. Employees have the right to do so in a confidential manner without fear of retaliation from management."
  - b) Mr. Downing allegedly received a verbal warning on December 16, 2013, but was not presented with a notice of the warning as required by Select policy until January 14, 2014.
  - c) Mr. Downing received a written warning on January 14, 2014 for conduct that occurred on January 3, 6, and 7, 2014.
  - d) In response to Select's allegation that he was threatening to the DON, Mr. Downing stated that he spoke with the DON and the clinical nurse manager because he was surprised to hear that the nursing staff had

---

<sup>2</sup> Manager was away from the facility prior to the warning notices being issued because he was on bereavement leave.

made complaints about him. He went into the DON's office and shut the door for privacy. He did not block them from leaving. The office is small and the only place he could stand was in front of the door. He did not interrogate the DON.

- e) On January 13, 2014, VP sent Manager an email which instructed him to terminate Mr. Downing's employment the following day. At the FFC, VP denied that he had spoken to Manager about terminating Mr. Downing's employment prior to January 14, 2014.
  - i. When VP was asked why Mr. Downing was asked to sign the warnings if Select had already determined that he was going to be discharged, VP stated that he is not sure why, and that Manager was following up with the warning because they still had to have documentation.
- f) At the FFC, Director stated that she was on the phone when VP discussed Mr. Downing's discharge with him. She stated that she did not recall if she spoke during the conversation, but she believed she had. Director did not recall when the telephone conversation took place. Mr. Downing stated that he never had a phone conversation with Director and/or VP regarding his termination.
- g) During a telephone interview with the DON, she stated that her office is not tiny, but it is smaller. During her interaction with Mr. Downing, he was in the doorway and his demeanor and body language seemed like he was trying to be intimidating. She stated that it felt like he was purposely blocking the door. He did not come in and sit. Unless it is brief, people usually come in and have a seat. The DON stated that Mr. Downing does not visit her office routinely for his work. The DON reported the incident to the Administrator, and does not recall if she spoke to anyone else about it.
- h) In support of its discharge of Mr. Downing, Select stated that an employee was terminated for the same or similar reasons as Mr. Downing. This employee was discharged for:
  - i. Inappropriate patient care after putting a cold pack directly on a patient's skin.
  - ii. Disregarding a patient's dignity and safety by continuing to treat a patient after the patient had soiled himself;
  - iii. Having a patient ask for someone else to treat him because the employee was too rough. The employee then asked the patient why she wanted another employee to treat her.
  - iv. The employee approached a patient's family about after being told not to.

#### **V. Analysis:**

- 1) The MHRA provides that the Commission or its delegated investigator "shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets the "reasonable grounds" standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The MHRA prohibits discharging an employee because of previous actions that are protected under the WPA. *See* 5 M.R.S. § 4572(1)(A). The WPA protects an employee who "acting in good faith . . . reports orally or in writing to the employer . . . what the employee has reasonable cause to believe is a violation of a law or rule adopted under the laws of this State, a political subdivision of this State or the United States." 26 M.R.S. § 833(1)(A).

- 3) In order to establish a prima-facie case of retaliation in violation of the WPA, Complainant must show that he engaged in activity protected by the WPA, he was the subject of adverse employment action, and there was a causal link between the protected activity and the adverse employment action. *See DiCentes v. Michaud*, 1998 ME 227, ¶ 16, 719 A.2d 509, 514; *Bard v. Bath Iron Works*, 590 A.2d 152, 154 (Me. 1991). One method of proving the causal link is if the adverse job action happens in "close proximity" to the protected conduct. *See DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 514-515.
- 4) The prima-facie case creates a rebuttable presumption that Respondent retaliated against Complainant for engaging in WPA-protected activity. *See Wyrwal v. Saco Sch. Bd.*, 70 F.3d 165, 172 (1<sup>st</sup> Cir. 1995). Respondent must then "produce some probative evidence to demonstrate a nondiscriminatory reason for the adverse action." *DiCentes*, 1998 ME 227, ¶ 16, 719 A.2d at 515. *See also Doyle*, 2003 ME 61, ¶ 20, 824 A.2d at 56. If Respondent makes that showing, the Complainant must carry his overall burden of proving that "there was, in fact, a causal connection between the protected activity and the adverse action." *Id.* Complainant must show that he would not have suffered the adverse action but for his protected activity, although the protected activity need not be the only reason for the decision. *See University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517, 2534 (2013) (Title VII); *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979) (MHRA discrimination claim).
- 5) Here, Complainant has established a prima-facie case of WPA retaliation. Complainant has shown that he engaged in protected activity. He brought up concerns about billing practices that he believed were fraudulent to Manager and Employee 1. These concerns were then communicated to VP by Manager. Complainant was discharged, and the proximity of Complainant's reports to his discipline and discharge suggests a causal connection between them.
- 6) Respondent has articulated a legitimate, nondiscriminatory reason for its decision to terminate Complainant's employment, namely that Complainant violated several rules of its Code of Conduct resulting in his termination of employment.
- 7) At the final stage of the analysis, Complainant has shown that he has at least an even chance of success in a lawsuit, and that he would not have been discharged but for his protected activity, with reasoning as follows:
  - a. There were significant credibility issues on the part of Respondent. During the FFC, Complainant was very credible in his account of the incidents leading up to his separation of employment. Respondent's witnesses, however, presented contradictory and false information and statements regarding Complainant's termination. Most notably, Complainant was discharged for what could be considered minor incidents, some of which were supported by Employee 1 at the time of the incident.
  - b. There was inconsistent treatment between Complainant and Employee 1. Both were present during the same conversation about communication issues. Neither was presented with any type of disciplinary warning related to the discussion at the time or soon after. However, on January 14, 2014, Complainant received notice of the "verbal warning" he supposedly received a month earlier. Employee 1 was not given a written notice. Also, Employee 1 used profanity towards Complainant in an interaction and Respondent did not discipline her at all. Finally, Complainant was disciplined for leaving a note about his schedule on a post-it note for Employee 1, while Employee 1 routinely left post-it notes for employees about schedule changes.

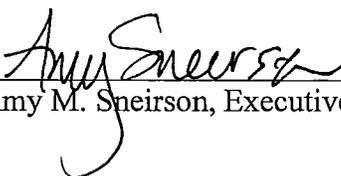
- c. Additionally, Respondent provided multiple shifting reasons for Complainant's discharge. Of note, Complainant was discharged in part for his interaction with two physicians. The record shows that neither Manager nor VP spoke with the physicians about the incidents. Furthermore, when Mr. Downing communicated with one of the physicians, the physician stated that he did not think Mr. Downing was unprofessional in the interactions. Employee 1 relayed the incidents with the physicians to Manager, both of whom were aware that Mr. Downing had concerns about the discharge process. Yet this was one of the reasons provided for Complainant's discharge.
- d. Also concerning is the fact that Respondent alleged that three people were involved in the termination of Complainant's employment, Manager, VP, and Director. At the FFC, VP and Director stated that all three were involved in a conference call discharging Complainant from employment. Complainant had no recollection of the conversation, and stated he had never spoken with Director. Manager also stated that he had no recollection of the conversation. He further stated that he alone had terminated Complainant's employment on January 14, 2014.
- e. Yet another inconsistency in Respondent's statements is the fact that VP stated that the decision to discharge Complainant did not occur until January 14, 2014. However, Respondent also produced an email dated January 13, 2014, in which VP clearly stated that Complainant would be discharged.
- f. While Complainant is not blameless with regard to his behavior, Respondent's inconsistencies demonstrate pretext in its explanation of Complainant's discharge. Furthermore, Respondent relied on Employee 1's statements related to many of the incidents that allegedly led to Complainant's discharge without speaking with the individuals directly involved, such as the interactions with the two physicians and the incident in the DON's office.
- g. The record in this case shows that Complainant is at least as likely as not to prevail in a court action. Respondent provided shifting explanations for its discharge decision, relied on third-hand reports from a supervisor who was known to have conflicts with Complainant, disciplined Complainant more harshly than Employee 1 for the same behavior, and performed at best cursory investigation of the incidents it claimed supported Complainant's discharge.

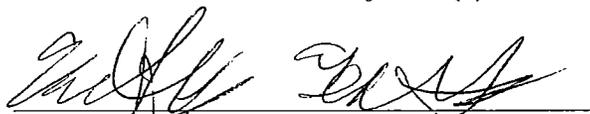
8) Discrimination in violation of the WPA is found.

**VI. Recommendation:**

For the reasons stated above, it is recommended that the Commission issue the following findings:

There are **Reasonable Grounds** to believe that Respondent Select Rehabilitation terminated Complainant Brian Downing's employment because he engaged in protected activity in violation of the WPA and MHRA, and conciliation should be attempted in accordance with 5 M.R.S. § 4612(3).

  
\_\_\_\_\_  
Amy M. Sneirson, Executive Director

  
\_\_\_\_\_  
Victoria Ternig, Chief Investigator