

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

TERRY LEE SMAALAND,

Complainant,

vs.

REGENTS OF THE UNIVERSITY OF COLORADO, UNIVERSITY OF COLORADO AT
COLORADO SPRINGS, FACILITIES SERVICES,

Respondent.

Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on May 23, 2005 at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Senior Associate University Counsel Rosemary Augustine represented Respondent. Respondent's advisory witness was David Schnabel, the appointing authority. Complainant appeared and was represented by Hollie Wieland. After submittal of legal authority by Complainant, the record was closed on May 25, 2005.

MATTER APPEALED

Complainant, Terry Lee Smaalnd ("Complainant" or "Smaalnd") appeals the five percent reduction in his pay by Respondent, Regents of the University of Colorado, University of Colorado at Colorado Springs, Facilities Services ("Respondent" or "UCCS"). Complainant seeks back pay, benefits and attorneys fees and costs.

For the reasons set forth below, Respondent's action is **affirmed** with regards to imposing a five percent reduction in pay and **modified** with regards to the length of time the five percent reduction in pay is imposed.

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority;

4. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. Complainant is employed at UCCS in the Facilities Services Department, in a classified position as Grounds & Nursery III, with a working title of Grounds Supervisor.
2. Maintenance of the natural and physical environment at UCCS is one of the responsibilities of the Facilities and Services Department.
3. Complainant's Position Description Questionnaire ("PDQ") lists his permanent, primary job duties but states that it does not include temporary assignments. Complainant's permanent, primary job duties focus on landscape work. One of the purposes of his position is to insure compliance with established safety measures. One of the functional attributes of his job state that he may be exposed to conditions such as fumes, noxious odors, dusts, mists, gases and poor ventilation, that affect the respiratory system, eyes or the skin.
4. In the past, Complainant has done some maintenance work on vehicles utilized by his shop, including changing the oil and replacing blades. He has also spray painted storage containers, a metal fence and a trailer on which he also did some welding work.

Ambulance Conversion

5. An ambulance was donated to UCCS that was initially used as a teaching aid by nursing students. It was decided to convert it to a delivery vehicle for use by the Mail and Shipping Services Shop. However, since it would be operated on both city and university streets UCCS' Director of Public Safety deemed it a safety problem if the emergency lights were not removed from the ambulance. UCCS did not want it to look like an ambulance when it in fact was no longer an ambulance, so that civilians would not pull over during its operation as a delivery van.
6. In early March 2005, prior to delivery of the vehicle to the Mail and Shipping Services Shop, Schnabel instructed Complainant to remove the cabinets on the interior, remove the ambulance lights, patch the holes left by the lights, paint the areas where the lights had been attached and paint over, with white paint, an existing twelve inch red strip.
7. Removal of the lights entailed unscrewing the lights with a Phillips screwdriver, filling the remaining hole with plywood, and using a fiberglass overlay which would be sanded and painted white, to match the rest of the vehicle. After removal of the lights there would be four 5" diameter holes on each side and five 3" diameter holes on the rear.
8. Removal of the twelve inch red strip entailed sanding and feathering out the strip and

2005B107

then painting it white, to match the rest of the vehicle.

9. Complainant received no special training to complete the ambulance conversion

10. Schnabel instructed Complainant to purchase a spray gun to complete the painting portion of the work assignment, as there were other vehicles that might, in the future, also need to be touched up.

11. The area in which Complainant was to complete the vehicle conversion work was located in a large building with huge garage doors, radiant heat panels above the doors and a welding shop in one area of the building. The ventilation system within the building meets the requirements for a welding operation. The building does not contain a paint booth.

12. After receiving the assignment, Complainant instructed Keith Woodring, an employee supervised by Complainant, to take the vehicle to Maaco and get an estimate on the cost to remove, patch and paint the lights around the top of the vehicle. On the way to Maaco, Woodring drove with the windows down as the interior of the vehicle "smelled bad."

13. The Maaco estimate was \$1848. Complainant filled out the appropriation forms to have the work done by Maaco and submitted them to Schnabel for approval. Schnabel wrote, "No way Jose" at the top of the forms and returned them to Complainant.

14. Complainant removed the cabinets from the inside of the van and Woodring hauled them to the dumpster. They also painted the red strip and the red headlights. While removing the cabinets, Complainant began to feel sick and his face became red and puffy. He went home and missed at least one other day of work.

15. When Complainant was painting over the red strip he kept the garage doors closed and the heaters on because the outdoor temperatures were cool.

16. On March 23, 2005, Schnabel noticed that the vehicle was parked in the Mail and Shipping Services Shop area but that the lights on the top of the vehicle had not been removed. The rest of the work assignment had been completed.

17. On March 24, 2005, Schnabel asked Complainant why the lights had not been removed. Complainant responded by stating that his heart was not in the work, he thought it looked just fine and that if Schnabel wanted it done he would have to find someone else. Complainant also said he was not sure of the EPA and environmental issues involved in the task. Finally, Complainant told Schnabel that he had not purchased a spray gun.

R-6-10 Meeting and Disciplinary Action

18. On Thursday, March 24, 2005, Complainant received notice of a R-6-10 meeting.

19. On Friday, March 25, 2005, a R-6-10 meeting was held at which Schnabel,
2005B107

Complainant and Sue Allison were present.

20. During the R-6-10 meeting, Complainant told Schnabel that the purchasing of the spray gun was on his list, that he knew nothing about patching holes, had last painted a vehicle when he was eighteen and was only responsible for the maintenance of his own vehicles. Finally he stated that he was not a certified mechanic, welder or body man and did not know everything about the EPA and the fire department.

21. Sometime in March 2005, Complainant contacted Ron Honn, Environmental Health and Safety Specialist, regarding the safety issues surrounding the painting of vehicles. On Tuesday, March 29, 2005, Honn responded to Complainant via email, asking for more information about the painting.

22. On March 30, 2005, Complainant emailed Honn that the spray painting would not exceed the use of ten gallons a year. That same day, Honn sent Complainant an email stating that ten gallons of paint was "well below the Colorado air emission and reporting and permitting requirements" and that he was still researching the fire code requirements.

23. On Wednesday, March 30, 2005, Complainant told Honn that ten gallons of paint would be used and Honn responded back that ten gallons would be well below the Colorado air emission reporting and permitting requirements and also that he believed ten gallons per year would be well within the fire code.

24. On Wednesday, March 30, 2005, Schnabel sent Complainant a disciplinary action letter. The letter imposed discipline of a five percent reduction in pay from \$3099 to \$2944, beginning April 1, 2005, for willful failure to perform involving the donated ambulance and procurement of a spray gun.

25. Prior to imposing discipline against Complainant, Schnabel looked at Complainant's prior history, including his most recent evaluation rating him as "outstanding."

26. Schnabel gave Complainant a disciplinary action rather than a corrective action because Complainant is a supervisor and, therefore, his actions were harmful to the department.

27. On April 6, 2005, Complainant timely appealed the disciplinary action.

28. On April 7, 2005, Honn sent Complainant a follow-up email stating that UCCS was not required to have a permit for spray operations under the Uniform Fire Code (UFC) Article 45, the code enforced at that time in Colorado Springs.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801¹ and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

A. Burden of Proof

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

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

Complainant was disciplined for not completing the vehicle conversion work assignment and for failing to purchase a spray gun. Complainant was instructed to convert the ambulance to a delivery van by removing the interior cabinets and the upper lights and painting over the twelve inch red strip. In addition, he was to purchase a spray gun to complete the painting portion of the assignment. The credible evidence established that Complainant completed only two of these four tasks. Complainant committed the acts for which he was disciplined.

¹ As of July 1, 2005, substantial amendments have been made to the Board Rules. However, given the time period covered by this action, the Board Rules in effective prior to July 1, 2005 have been applied and all references within this Initial Decision to the Board Rules are to the rules in effective prior to July 1, 2005.

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

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

Respondent, in disciplining Complainant, found his behavior was a willful failure to perform duties assigned to him. Complainant argues that the work assignment was not within the scope of his PDQ and that the work environment in which the assignment was to be done violated safety regulations.

Appointing authorities have the discretion to define a job. Board Rule R-1-6, 4 CCR 801. It is noted that in the past Complainant had done some painting work on metal objects (a fence, a trailer and storage containers). While the assignment in this action was not part of Complainant's permanent work duties, it did fall within the scope of responsibilities of Complainant's department and was, at least partially, something he had done before. Understandably, not all possible duty assignments are included in an employee's PDQ. In fact, the stock language of the PDQ recognizes this by stating that the described duties in the PDQ do not include temporary assignments. Occasionally, tasks will arise that are not part of an employee's duties and an appointing authority may assign those temporary tasks to an employee. There is no prohibition against such assignments. Such a blanket prohibition would stymie state agencies from achieving their missions. This is not to say that an appointing authority may assign any type of work duties to an employee, as there must be some type of basis for the assignment. If the duties become a permanent part of the employee's job, then, in order to maintain the constitutional mandate of "like pay for like work", Colo. Const., art. XII, Sec. 13(8) and the internal equity of the state classification system, an individual position review could be conducted under the Director's Procedures, Chapter 2, 4 CCR 801. The decision to discipline Complainant was a reasonable exercise of Schnabel's discretion as an appointing authority.

If an employee is given a temporary assignment, then he or she must be able to perform that task safely and in compliance with any environmental or workplace safety regulations and/or laws. Complainant argued that it was not possible for him to do so. However, he presented no credible evidence of any safety regulations that would be violated if he performed the tasks assigned. He argued that Respondent was violating both OSHA and Colorado Springs fire safety regulations by forcing him to complete the task assigned. While Complainant cites to numerous OSHA regulations, as pointed out by the Respondent, those regulations do not apply to Respondent as the definition of an

2005B107

“employer” under those regulations “does not include . . . any State or political subdivision of a State.” 29 CFR 1910.2(c) (emphasis added).

In support of its argument that Respondent has violated Colorado Springs fire safety regulations, Complainant cites to portions of the 1997 Uniform Fire Code, in particular the section addressing “limited spraying areas.” Article 45, Section 4502.6, 1997 Uniform Fire Code. Under this section, a limited spraying area is when the area to be sprayed is no more than nine square feet. Article 45, Section 4502.6.3, 1997 Uniform Fire Code. If an area is a limited spraying area then there are specific ventilation and electrical wiring requirements that must be met. The credible evidence established that the area to be sprayed, after the emergency lights were removed, totaled less than nine square feet. There was no evidence presented that either the ventilation or the electrical wiring did not meet the standards for a limited spraying area. If the assignment to Complainant had been completed, it would not have violated either OSHA or the Colorado Springs fire safety regulations.

Respondent has met its burden of establishing that, under *Lawley*, it did not act arbitrarily or capriciously or contrary to rule or law in making the work assignment to Complainant nor in disciplining Complainant for not completing that assignment.

C. The discipline imposed was not within the range of reasonable alternatives

In deciding to impose disciplinary action, an appointing authority must consider, among other things, the nature, extent, seriousness, and effect of the act, the type and frequency of previous unsatisfactory behavior or acts, prior disciplinary action, previous performance evaluations. Board Rule R-6-6, 4 CCR 801. The credible evidence demonstrated that Schnabel, as the appointing authority, considered a corrective action, rather than a disciplinary action, and imposed a disciplinary action because Complainant was a supervisor, a lead worker, overseeing other employees. The imposition of the higher level of discipline, in light of Complainant’s role as a supervisor and, therefore, a role model for other employees is reasonable. However, there was no credible evidence as to why Schnabel imposed a permanent reduction in Complainant’s pay, rather than a reduction that was tied, in some way, to the importance or even cost of the task which Complainant refused to complete. Under Board rules, employees are to be subjected to progressive discipline, unless their actions are flagrant or serious. Board Rule R-6-2, 4 CCR 801. While Complainant’s actions were deliberate, given that Complainant had an “outstanding” evaluation just one month prior to this incident and no history of this type of disciplinary problem, it was unreasonable to impose a permanent reduction in his pay. A twelve-month reduction in pay of five percent, from the date of the disciplinary action, is more closely aligned to the seriousness of Complainant’s action and, therefore, under Board Rule R-6-6, is a more reasonable discipline.

D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith,
2005B107

maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801. In this matter both parties request attorney fees. A party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule R-8-38(B), 4 CCR 801. Given the above findings of fact an award of attorney fees to Complainant is not warranted.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined.
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was not within the range of reasonable alternatives.
4. Attorney's fees are not warranted.

ORDER

Respondent's action is **affirmed** with regards to the imposition of the disciplinary action and **modified** with regards to the length of time the disciplinary action is imposed. Complainant's pay is reduced by five percent per month for a total of one year. Attorney fees and costs are not awarded.

Dated this 11th day of July, 2005.

Kristin F. Rozansky
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

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. 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. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may 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 decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made 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.

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 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11-inch paper only. Rule R-8-64, 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. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of July, 2005, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Hollie Wieland
Sears & Swanson
The Holly Sugar Building, Suite 1250
2 North Cascade Avenue
Colorado Springs, Colorado 80903

and in the interagency mail, to:

Rosemary Augustine
Senior Associate University Counsel
1420 Austin Bluffs Parkway
University of Colorado at Colorado Springs
Colorado Springs, Colorado

Andrea C. Woods