

AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JAMES MCNAUGHT,

Complainant,

vs.

DEPARTMENT OF REVENUE,

Respondent.

After issuance of the Initial Decision, Respondent filed a motion requesting that identifying information regarding audited corporations be removed from the Initial Decision, pursuant to Section 39-21-113(4)(a), C.R.S. (2002). The motion was granted. Corporation names are either removed or substituted with letters herein. Modifications appear in bold.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on November 12, 2002. Assistant Attorney General Hollyce Farrell represented Respondent. Complainant appeared and represented himself.

MATTER APPEALED

James McNaught ("Complainant" or "McNaught") appeals his termination from employment by Respondent, Colorado Department of Revenue ("DOR").

For the reasons set forth below, Respondent's action is **affirmed**.

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.

FINDINGS OF FACT

1. Complainant was an Out-of-State Revenue Agent in the Tax Audit and Compliance Division, Field Audit Section, of DOR, from 1987 through his termination in September

2002.

2. Complainant was the sole auditor working on behalf of the State of Colorado in New York State. His job was to conduct audits of New York corporations that do business in Colorado, to assure that they accurately report taxable income and timely pay tax.
3. McNaught worked alone, out of his home, without significant supervision. Due to the highly independent nature of his job, McNaught's position was one of high trust.

Needs Improvement Rating for 2000 - 2001

4. Complainant had two direct supervisors for the 2000/2001 rating period, whose performance ratings were averaged together. McNaught's final combined rating for 2000/2001 was 112. Needs Improvement was defined as between 100 and 174 points; thus, it was an extremely low rating. Among the reasons for this low rating were McNaught's failure to turn in even one completed audit in the last nine months of the performance period; his failure to turn in time sheets and work plan reports either on time or at all; his almost monthly revision of audit completion dates on his work plans; and his excessive billing to non-audit, administrative categories such as "issue research" and "computer maintenance" when he should have been performing audits full-time.
5. McNaught's new supervisor as of October 2000 was Doug Pollack, Audit Group Manager, Field Audit Section. In his cover memo to McNaught accompanying the final evaluation, Pollack noted,

" As a requirement of the performance management system, we will need to review a performance improvement plan when you come to Denver in June. The performance improvement plan will hopefully get you back on track to producing the level of work that is both expected and required of each of the revenue agents in this section and to managing and reporting your work time and work plan in accordance with policies and procedures."
6. In accordance with DOR's performance management policy, a committee reviewed the Needs Improvement rating to assure its appropriateness. The panel affirmed the rating and noted that supporting "documentation is thorough and complete."

May 2001 Performance Plan

7. On May 30, 2001, Pollack placed McNaught on a Performance Plan. McNaught signed the Plan and agreed that the terms were reasonable and manageable. Terms included the following:
 - A. By September 1, 2001, he was to complete and submit for review the audits for **six corporations**.

- B. By January 1, 2002, he was to complete and submit for review the audits for **three additional corporations**.
- C. Further audits would be added to his work plan to be completed by April 2002.
- D. He was to turn in time keeping documents by the 5th of each month, and to keep non-audit time to a minimum.

December 2001 Corrective Action

- 8. During the latter half of 2001, Pollack regularly spoke with McNaught about meeting the terms of the Performance Plan. McNaught repeatedly committed to meet the goals in the Plan.
- 9. McNaught failed to meet the terms of the Performance Plan. Specifically, he completed only one audit out of the six required by September 1, 2001. And, by December 5, 2001, he had completed none of the remaining three audits he was to complete by January 1, 2002.
- 10. On December 5, 2001, Respondent issued a Corrective Action ("CA") to McNaught. It required that he complete the remaining eight audits listed in the May 30, 2001 Performance Plan no later than March 17, 2002. This represented a five-and-a-half month extension on five audits, and a two-and-a-half month extension on three audits. He was further required to complete one additional audit by March 17, 2002.
- 11. In February 2002, McNaught's hard drive crashed and he lost data. The extent of the data and the amount of time he had to spend re-creating work documents is unknown.
- 12. McNaught did not grieve the Corrective Action.
- 13. McNaught did not comply with the terms of the Corrective Action. He turned in two of the nine required audits by March 17, 2002.

April 2002 Corrective and Disciplinary Action

- 14. On April 18, 2002, Respondent imposed on Complainant a disciplinary pay reduction from \$6,919.00 to \$6,227.00 per month, and a corrective action, based on his failure to comply with the terms of the December 2001 Corrective Action.¹
- 15. The Corrective Action required McNaught to complete the seven remaining audits by July 24, 2002. It required that within fifteen days he turn in copies of statute waivers for each of the seven audit files "showing that the applicable audit period(s) is(are) open and has(have) been kept open during the time the audit has been ongoing." It further required that he turn in a revised workplan that included corrections of account numbers and the actual start date for each of the audits.

¹ McNaught appealed the April 2002 corrective and disciplinary action to the State Personnel Board. However, he withdrew his appeal prior to hearing and the case was dismissed with prejudice.

16. If an audit extends beyond the statutory period of 3 years (or 4 years under federal law), a series of waivers signed by the audited corporation must be obtained. If there is a break in the timeline of these waivers, ethical rules prohibit DOR from collecting any tax revenue from the company, even if the company agrees to sign waivers for the missing periods or to pay the tax that would be due.
17. McNaught completed only two of the seven required audits by July 24, 2002. In addition, he did not provide copies of all required waivers.
18. At hearing, McNaught claimed to be ignorant of the rule regarding waivers and offered evidence that all companies he audited did not oppose paying taxes due. McNaught was a 15-year DOR auditor. He either knew or should have known about the waiver rule, and his failure to aggressively assure that all required waivers were obtained constitutes a serious, fundamental performance breach.

Problems with Audits McNaught Turned In

19. McNaught made obvious errors in many of the audits he turned in. In one case, the company had turned in a number of amended tax returns and owed additional tax. McNaught's audit included no information concerning the amended returns, and failed to assess interest and penalties.
20. On another audit, McNaught failed to note that the taxpayer had made estimated tax payments on another account. McNaught's audit showed that the taxpayer still owed the payments that had already been made on the other account.
21. Two of the seven audits McNaught submitted were inappropriately designated as "no adjustment" audits. A "no adjustment" audit is one in which no tax is due that year; the designation precludes DOR from re-auditing for adjustments. They are extremely rare.
22. The **Corporation A** "no adjustment" audit was unwarranted. The company's amended tax returns showed that tax was due.
23. On the other "no adjustment" audit, McNaught billed an excessive amount of time to the audit, yet the file contained insufficient documentation to support the determination that no tax was due. In fact, when Pollack reviewed the file he found that it would have been easy to make further adjustments.
24. The number of hours McNaught spent on the audits he completed was excessive.

Events Preceding Termination

25. On August 5, 2002, McNaught's appointing authority, D. Malonson, Chief Auditor, Field

Audit Section, DOR, sent a letter noticing a pre-disciplinary R-6-10 meeting to McNaught.

26. On August 28, 2002, McNaught, his attorney, Malonson, and Pollack attended the R-6-10 meeting. At Malonson's request, McNaught brought all of the audit files he had been working on so that she could review them. Pollack also reviewed the files and discussed them with Malonson.
27. At the meeting, McNaught explained that **Corporation B's** tax and business records were unavailable for ten months following the September 11, 2001 terrorist attack in New York. He also explained that he had difficulty reading microfiche information. He further noted that his work papers were not in the audits because they had been recently lost when his computer hard drive crashed (in February 2002).
28. At the meeting, McNaught also presented Malonson with an August 25, 2002 letter reviewing his performance history while at DOR. The letter states in part, "Given the limited resources and support I have to work with in New York, there is no other current employee in the field audit section who has brought more to the State of Colorado than myself." The letter contains a list of companies he had audited in his position at DOR, for which the total amount he assessed was over \$75 million. All of the companies listed are Fortune 500 companies. In the letter, he points out that nine previous non-filers are now paying taxes in Colorado due to his sole initiative. Lastly, he states that by working out of his home, he saves the State of Colorado \$5,000.00 per month in rent.
29. McNaught was given until September 5, 2002 to provide written answers to questions given him by Pollack. While the questions presented are not in evidence, a summary of his responses follows:
 - A. **Corporation B** Income Tax. He did examine the amended returns to consider whether any tax, interest or penalty was due, but the microfiche copies were either illegible or extremely difficult to read. He no longer has the transcripts in question, but has a "very limited" ability to read transcripts. "In 15 years of employment, I never received proper training in how to read transcripts." He has historically relied on his immediate supervisor or on Gary Maelzer for assistance in that regard.
 - B. **Corporation A**. He examined the initial returns, but due to his limited ability to read transcripts, was not aware that the company subsequently filed amended returns. He expected the amended return to be forwarded to him by the company. He did not receive copies of correspondence between the company and the taxpayer service section, but should have. [Some information provided refers to the questions that are not in evidence, and is therefore of no probative value.]
 - C. **Corporation B** Use Tax. He had field visits to the company in 1999 and 2000. After those visits, it took about 18 months to receive the requested invoices. The taxpayer was unavailable from September 11, 2001 through July 1, 2002 due to the terrorist attack.

D. Regarding "use tax" cases, he has never received any training in conducting those types of audits. When he asked for copies of completed use tax cases from the Denver office, for use as a model, he received "a brush off."

30. McNaught did attend at least one training on reading transcripts in Denver, apparently in 1993.

31. On September 19, 2002, after considering all information provided by McNaught, reviewing his performance history and the audit files he turned in, and discussing the files with Pollack, Malonson terminated McNaught's employment.

DISCUSSION

I. Standard of Proof

Certified state employees have a property interest in their positions and may only be terminated 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 Rule R-6-9, 4 CCR 801 and generally includes:

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

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. *Kinchen, supra*. The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. Complainant committed the acts for which he was disciplined

DOR met its burden of proving that McNaught committed the acts and omissions for which he was terminated, as demonstrated by the Findings of Fact above. He performed at a Needs Improvement level in 2000 - 2001. Respondent placed him on a Performance Plan in lieu of imposing immediate corrective action. After agreeing to the terms of the May 2001 Performance Plan, he failed to meet those conditions, for no apparent reason. Then, having agreed that the terms of the December 2001 Corrective Action were reasonable, he failed to meet even one quarter of the terms of that document. While the September 11, 2001 terrorist attack barred his access to

documents necessary to complete the two **Corporation B** audits for ten months, through July 2002, this constitutes only partial mitigation: by April of 2002 he had completed only two of the nine required audits. Respondent then imposed a second corrective action extending the deadlines for the uncompleted audits, accompanied by a disciplinary action. Despite the significant extensions of time, McNaught was again unable to complete quality work in a timely manner. The audits he did turn in contained fundamental errors. His job performance failed to comply with standards of efficient service or competence.

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

In Colorado, arbitrary and capricious agency action is defined as:

(a) neglecting or refusing 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; (b) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or (c) exercising 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. Dep't of Higher Education, 36 P.3d 1239, 1252 (Colo. 2001), citing *Van DeVegt v. Board of County Commissioners of Larimer County*, 55 P.2d 703, 705 (Colo. 1936).

While McNaught made several arguments in his defense at hearing, he did not provide evidence to support them. First, he averred that the change in supervisors led to a lack of clarity regarding his job duties. However, he offered no specific evidence of precisely how a change in supervisors adversely affected his ability to understand or perform his job responsibilities.

McNaught also argued that he should not be held accountable for being unable to read transcripts, because Respondent never provided him with the necessary training to be proficient in that skill. In his September 5, 2002 letter response to Pollack's questions, he stated that due to his limited ability to read transcripts, he was unaware of **Corporation A's** amended return. His failure to either read the transcript or to arrange for another individual to assist him in doing so led directly to his decision to designate **Corporation A** as a "no adjustment audit," a serious error.

As the sole auditor assigned to the **Corporation A**, it was McNaught's responsibility to take all steps necessary to review the information contained in the transcript. His failure to do so was his failure alone. It was willful misconduct for McNaught to neglect to review all information in the transcript prior to designating **Corporation A** as a "no adjustment audit." He did so with full knowledge that he was unaware of all relevant information necessary to render an accurate audit.

McNaught also argued that the computer crash he experienced posed a hardship on his ability to complete audits on time. Again, at hearing he failed to provide concrete evidence of exactly what

information he lost, how much time it took to recover information, and how much time he had to spend re-creating work he had lost. Without specific evidence, it is impossible to give weight to his argument in mitigation.

Lastly, McNaught argues that it was unfair for D. Malonson to terminate him so soon after she became chief auditor. Malonson assumed her position as appointing authority after the December 2001 Corrective Action was issued, in February 2002. McNaught introduced no evidence demonstrating that Malonson had any type of bias towards him. In fact, under Malonson's stewardship, Respondent appropriately gave McNaught a number of opportunities to improve his performance, utilizing progressive discipline in just the manner required.

In summary, Respondent's action was not arbitrary, capricious, or contrary to law.

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.

INITIAL DECISION

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

Dated this _____ day of December, 2002.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln Street, Suite 1400
Denver, CO 80203
303-894-1236

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 December, 2002, I placed true copies of the foregoing **AMENDED INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE** and **NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

James McNaught
Post Office Box 580
Garrison, New York 10524-0580

and in the interagency mail, to:

Hollyce Farrell
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