

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DENNIS BIRK,

Complainant,

vs.

ARAPAHOE COMMUNITY COLLEGE,

Respondent.

This matter was heard on January 22, 2003, by Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Luis A. Corchado, Assistant Attorney General. Complainant represented himself.

MATTER APPEALED

Complainant appeals the disciplinary termination of his employment. For the reasons set forth below, a suspension is substituted for the termination.

ISSUES

1. Whether complainant committed the acts for which discipline was imposed;
2. Whether there was just cause for the discipline imposed;
3. Whether respondent's action was arbitrary, capricious or contrary to rule or law.

FINDINGS OF FACT

The Administrative Law Judge has considered the exhibits and the testimony, assessed the credibility of the witnesses and makes the following findings of fact, which were established by a preponderance of the evidence.

1. Complainant, Dennis Birk, was a twelve-year custodial employee of respondent, Arapahoe Community College (ACC), when he was dismissed from employment on December 2, 2002, effective November 30, 2002.
2. The work schedule for custodians at ACC is from 9:00 p.m. until 5:30 a.m., Sunday to Friday.
3. Jess Ortega, complainant's immediate supervisor, is one of two custodial supervisors, each supervising a crew of six.
4. All custodians report for duty by attending a 9:00 p.m. meeting, where they are given their work assignments and the necessary keys. Work assignments and duties vary according to the day of the week
5. As a supervisor, Ortega usually arrives at work around 8:30 p.m. On Wednesday, November 6, 2002, Ortega arrived at work and found two messages on his pager from complainant, whom he then telephoned. Complainant stated that he would need a few days off work because he sprained his ankle.
6. Also on November 6, Ernest Herrera, Housekeeping Superintendent, who is Ortega's supervisor and complainant's indirect supervisor, received a telephone voice message from complainant saying that he would not be in that night because of a sprained ankle.

7. Complainant was not present at the required 9:00 p.m. meeting.
8. Ortega and custodian Sonny Ellison cleaned the area that complainant would have cleaned if he had been there.
9. Complainant was absent from work the next day, November 7, but did not call in.
10. Complainant's supervisor, Ortega, marked on complainant's monthly timesheet that he was out on sick leave on November 6 and November 7, 2002.
11. Complainant's next regularly scheduled workday was Sunday, November 10. Upon his arrival, Ortega handed him a leave form requesting sick leave for November 6 and 7 and told him to sign it. Complainant agreed that he was absent on November 7 but disagreed that he was absent on November 6 and, consequently, would not sign the form.
12. Ortega informed his supervisor, Herrera, that complainant would not sign the leave request form. Herrera then went to talk to complainant, who insisted that he was present on November 6.
13. David Castro became respondent's Director for Human Resources on August 1, 2002. In that capacity, he was delegated the appointing authority for all custodians.
14. On November 13, Castro was notified by memo that complainant refused to sign a sick leave request. There is no evidence of exactly what the memo said or who wrote it.

15. A predisciplinary meeting was held on November 27, 2002. Complainant continued to insist that he was at work on November 6.
16. Castro received information from Ortega that custodian Sonny Ellison had stated that complainant asked him to back him up on being at work on November 6.
17. Castro received information from Herrera that custodian Bill Buschauer had stated that complainant asked him to say that he, complainant, was there that night, and he, Buschauer, said he would not lie.
18. Neither Ellison nor Buschauer testified at hearing.
19. Complainant admits to asking Ellison and Buschauer if they remembered him being at work on November 6. He denies any strong-arm tactics or asking them to lie.
20. The appointing authority, Castro, concluded that immediate termination of employment was the appropriate sanction because of complainant's dishonest attempt to get others to say he was at work when he was not. Castro did not believe that refusing to sign a leave slip, by itself, justified termination.
21. Complainant's overall rating on his most recent performance appraisal was Fully Competent.
22. No ulterior motive was uncovered for complainant insisting that he was at work on November 6 instead of being off sick.

23. In his letter terminating complainant's employment, the appointing authority referenced "affidavits from numerous co-workers." There is no evidence of any affidavits or any other written statements from complainant's co-workers.
24. Complainant Dennis Birk filed a timely appeal of his dismissal on December 9, 2002.

DISCUSSION

I.

In this disciplinary proceeding, because certified state employees have a protected property interest in their employment, the burden is on the agency to prove by a preponderance of the evidence that the acts or omissions on which the discipline was based occurred and that just cause exists for the imposition of the discipline. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

Hearsay evidence may constitute substantial evidence of a material fact in administrative proceedings without violating due process principles as long as the hearsay is sufficiently reliable and trustworthy and contains "probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs." *Industrial Claims Appeals Office v. Flower Stop Marketing Corporation*, 782 P.2d 13, 18 (Colo. 1989). See also Section 24-4-105(7), C.R.S. In abolishing the residuum rule (requiring some nonhearsay evidence in making an administrative determination), the Colorado Supreme Court quoted and relied on, in part, 3 K.C. Davis, Administrative Law 16:6 (2d ed. 1980), as follows:

Rejection of the residuum rule does not mean that an agency is compelled to rely on incompetent evidence; it means only that the agency and the reviewing court are free to rely upon the evidence if in the circumstances they believe that the evidence should be relied upon.

782 P.2d at 17.

The *Flower Stop* court borrowed from other jurisdictions in setting forth the following factors as "helpful guidance," but not as a mandatory checklist, in determining whether evidence in an administrative hearing is reliable, trustworthy and probative: (1) whether the statement was written and signed; (2) whether the statement was sworn to by the declarant; (3) whether the declarant was a disinterested witness or had a potential bias; (4) whether the hearsay statement is denied or contradicted by other evidence; (5) whether the declarant is credible; (6) whether there is corroboration for the hearsay statement; (7) whether the case turns on the credibility of witnesses; (8) whether the party relying on the hearsay offers an adequate explanation for the failure to call the declarant to testify; and (9) whether the party against whom the hearsay is used had access to the statements prior to the hearing or the opportunity to subpoena the declarant.

II.

Pursuant to the reasoning of *Flower Stop, supra*, the hearsay testimony of declarants Sonny Ellison and Bill Buschauer is not sufficiently reliable and trustworthy to constitute substantial evidence of a material fact that was a determinative factor in the choice of the discipline of termination of employment. The statements were not sworn to by the declarants. The hearsay statements were denied by complainant. There is no corroboration for the hearsay statements. The case turns on the credibility of witnesses. It is impossible to assess the credibility of the declarants. Respondent did not offer an adequate, or any, explanation for its failure to call the declarants to testify. There is no evidence of exactly what the words of the hearsay statements were, the tone of voice of the speaker, or the demeanor with which the statements were made, all of which may have a bearing on the intended meaning and interpretation.

Without reliance on this unreliable and untrustworthy hearsay evidence, there is no proof that complainant engaged in a dishonest attempt to persuade others to say he was at work when he was not. Even if the hearsay is relied upon, the testimony is insufficient to prove the necessary fact by a preponderance of the evidence. There is nothing wrong with complainant asking his co-workers if they remembered him being there. See Findings of Fact 16, 17, 19, 20. Although there is no evidence of a motive for complainant to consistently and adamantly maintain that he worked on November 6, other than his belief that he did so, the weight of the evidence is that he was absent. Yet, his refusal to sign a leave

request form that he claimed was inaccurate does not rise to the level of just cause for the immediate dismissal of a twelve-year employee with no record of any similar incidents in the past.

III.

Board Rule R-6-9(B), 4 CCR 801, provides that: "If the board or hearing officer reverses a dismissal, but finds valid justification for the imposition of disciplinary action, a suspension may be substituted for a period of time up to the time of the decision." This rule is in accord with the Board's statutory authority to modify, as well as reverse, an action of an appointing authority. See §24-50-103(6), C.R.S. Thus, Rule R-6-9(B) provides for the appropriate sanction in this case.

Respondent did not meet its burden to prove by preponderant evidence that complainant committed the acts for which discipline was imposed and that there was just cause for the discipline of termination. See *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). In this instance, complainant's dismissal should be rescinded and a disciplinary suspension of 30 days be substituted per Rule R-6-9, which provides for a maximum suspension of 30 days by the appointing authority, taking into account the factors of Rule R-6-6 in determining the level of discipline.

CONCLUSIONS OF LAW

1. Complainant did not commit all of the acts upon which the discipline was based.
2. There was not just cause for the discipline that was imposed.
3. Respondent's action of terminating complainant's employment was arbitrary, capricious or contrary to rule or law.

ORDER

Respondent's termination action is reversed. A disciplinary suspension of 30 days is substituted for the termination. Complainant shall be reinstated to his former position with back pay and benefits, except for the period of suspension and any income complainant earned but would not have earned if his employment with respondent had not been terminated.

DATED this ____ day
of January, 2003, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge

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. The notice of appeal must be received by the Board no later than the 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 a written notice of appeal is not received by the Board 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 January, 2003, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Dennis Birk
295 Osceola Street
Denver, CO 80219

And through the interagency mail, to:

Luis Corchado
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver, CO 80203
